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No. 3177

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant.

vs.

CANYON LUMBER COMPANY, PORT BLAKELY MILL COMPANY, and GUS SMITH and CECILIA SMITH,

Appellees.

Apostles on Appeal

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Press of Pliny L. Allen Co., Seattle

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No.....

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United States District Court, Western District of Washington, Northern Division.

No. 3501

CANYON LUMBER COMPANY,

Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,

Respondent.

PORT BLAKELY MILL CO.,

Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,

Claimant.

TUG "KLICKITAT," Etc.,

Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,

Claimants of "Klickitat."

NAMES AND ADDRESSES OF COUNSEL

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MESSRS. HASTINGS & STEDMAN, Proctors for Appellees, Canyon Lumber Company and Port Blakely Mill Co.,
64 Haller Building, Seattle, Washington.

ROY L. CADWALLADER, Esq., Proctor for Appellees, Gus Smith and Cecilia Smith,
64 Haller Building, Seattle, Washington.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 3501

CANYON LUMBER COMPANY,

Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,

Respondent.

PORT BLAKELY MILL CO.,

Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,

Claimant.

TUG "KLICKITAT," Etc.,

Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,

Claimants of "Klickitat."

STIPULATION RE RECORD ON APPEAL

IT IS HEREWITH STIPULATED between the proctors for the respective parties in this cause that the clerk of this court, in making up the record on appeal, may, after the caption of the cause and the addresses of counsel, insert the following state-

ment in lieu of all claims, pleadings, bonds, etc., filed prior to the entry of the final decree.

IT IS FURTHER STIPULATED that the said statement together with the transcript of the evidence and the oral decision of the court, hereunto attached, and the exhibits on file in the cause, shall be taken to be a sufficient record on appeal of all proceedings taking place prior to the entry of final decree.

DONE this 7th day of June, 1918.

HASTINGS & STEDMAN,
Proctor of Canyon Lumber Co., Libellant, and Port Blakely Mill Co., Intervening Libellant

BRONSON, ROBINSON & JONES,
Proctor for Puget Sound Navigation Co., Claimant of S. S. Indianapolis and Cross Libellant against "Klickitat"

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecilia Smith, Claimants of the "Klickitat"

STATEMENT

This cause was instituted by libel of the Canyon Lumber Company and intervening libel of Port Blakely Mill Company, both filed on December 23, 1916, against the S. S. Indianapolis. The Puget Sound Navigation Company claimed the respondent vessel and released it by bond to the marshal on which bond Joshua Green and C. H. J. Stelten-berg were sureties.

The libellant and intervening libellant alleged in substance that the Canyon Lumber Company, libellant, owned the scow "Dorothy D", which laden with lumber belonging to the intervening libellant, Port Blakely Mill Company, was being towed from Port Blakely to Pier "2" in Seattle by the tug Klickitat on the morning of October 20, 1916. That while proceeding through a thick fog and at less than one-half speed and with all due precaution, the said barge was run down by the S. S. Indianapolis at about 7:07 A. M. That the said Indianapolis was proceeding at the immoderate rate of speed of about fifteen knots or more per hour; that she cut through the said scow, slicing off the port corner, thereof, a wedge shaped piece about 7x70, and spilled a large portion of the scow's cargo of lumber into the bay. That having done so, she proceeded on her course without stopping or laying to. The damage to the libellant was alleged to be $2275.00 and to the intervening libellant, $236.10.

On September 21, 1917, the claimant, Puget Sound Navigation Company, filed its answer denying the allegations of negligence, and denying the allegations as to the amount of damage for want of knowledge and information. At the same time, and with permission of the court, it filed a libel against the Klickitat under Admiralty Rule 57, alleging that said tug was in truth and fact responsible for the collision. Gus Smith and Cecilia Smith claimed

the tug and released her by bond with American Surety Company as surety. Subsequently they filed a general denial and set up affirmative allegations as to the fault of the Indianapolis, substantially the same as were formerly set out by the libellant and cross libellant.

At the opening of the trial, which took place before the Hon. Jeremiah Neterer on March 27, 1918, the proctors for the respective parties, stated to the court that it was agreed among them that the amounts of the libellant's and of the intervening libellant's loss were as stated in the pleadings, and that it was also agreed that in view of the general allegations of fault in the pleadings of all the parties, and of the triangular nature of the case, that each of the parties might introduce such evidence of fault as it desired, the court to determine at the close of all the evidence upon whom the loss should fall. At the close of all the evidences, the proctor for the Puget Sound Navigation Company admitted that the evidences showed that the Indianapolis was at fault but contended that the evidences also showed that the Klickitat was also guilty of fault contributing to the collision in that, having regard to the nature of her tow and having regard to the time and place of towage, she was improperly and insufficiently manned, and in that she had no proper look-out and particularly in that she violated rule 16 of the Inland Rules by going at an immoderate speed and

by failing to stop her engine when she heard the whistle of an approaching vessel, substantially dead ahead. On these grounds, the Puget Sound Navigation Company contended that the damages of the libellant and the intervening libellant should be assessed against the S. S. Indianapolis and the tug Klickitat equally. These contentions the court denied and on April 1, 1918, entered a final decree against the Puget Sound Navigation Company, and stipulators on its bond, for the whole amount of damages.

The foregoing Stipulation and Statement, to which was attached the following Transcript of Evidence and Oral Decision of the court were filed in the United States District Court, of the Western District of Washington, June 7, 1918.

FRANK L. CROSBY, Clerk.

By ED. M. LAKIN, Deputy.

In the United States Court, Western District of Washington. Northern Division.

No. 3501

CANYON LUMBER COMPANY, Libelant.

vs.

S. S. "INDIANAPOLIS" Respondent.

This cause coming on regularly for hearing on this March 27th, 1918, at the hour of ten o'clock a. m. before the Honorable Jeremiah Neterer, Judge, the libellant appearing by its proctors, Messrs. Hastings & Stedman, and the respondent appearing by its proctors, Bronson, Robinson & Jones, and Gus Smith and Cecilia Smith, claimants of Klickitat by Roy L. Cadwallader, their proctor, the following proceedings were had and testimony taken, to-wit:

OLIVER D. HOUCHEN, produced as a witness on behalf of libellant, being first duly cautioned and sworn, testified as follows:

Q. (MR. STEDMAN) State your full name.

A. Oliver D. Houchen.

Q. What was your occupation in October, 1916?

A. I was master of the tug "Klickitat."

Q. Licensed?

A. Yes sir.

Q. How long have you been a master of tugs?

A. I have been master of the tug "Klickitat" since April 19, 1911.

Q. You had experience before that?

A. Yes.

Q. You are now master of a tug?

A. Yes.

Q. You own your own tug?

A. Yes; I am operating my own tug.

Q. Now, on the morning of October 20th, state to the court the circumstances of your bringing the "Dorety D." to Port Blakeley.

A. October 20, 1916,I left Port Blakely about twenty minutes of five with the "Dorety D." and also two floats—in the morning—a. m.—and I had the "Dorety D." behind on the tow line, and the two floats that I had were one behind the other one, and they were towed behind this "Dorety D.", and I left Port Blakely at the time stated on the way to Seattle.

Q. What was the weather then?

A. The weather was clear that morning. You could see lights at a great distance. It was a very clear morning. I passed out of Port Blakely on my way to Seattle and went north of the Blakeley Rocks, leaving them on my south side, going to the north of them, and then I steered by the compass on the "Klickitat" northeast by east, half east. Now, that course should bring me into Seattle according to the way the tide was running that morning, it would bring me into Pier 2, that is a straight course, and as I came into Seattle I came up close

to the buoy; I was in between the buoy and Luna Park, half way between. That course brought me in there, and I generally steered that kind of a course in approaching Seattle to be out of the way of passing steamers, to keep on the inside, as all steamers generally pass to the north of the buoy; and when I got abreast of the buoy the weather began to get foggy; a kind of fog bank settled down and I began to blow my fog signal, one long and two short whistles, signifying that the boat was coming with a tow. Now, I blew those whistles a little bit oftener than what we generally do because of the position I was in and boats passing backwards and forwards, there would be no difficulty in their knowing that there was a boat coming with a tow.

Q. What whistles did you blow?

A. One long and two short.

Q. At what interval?

A. About thirty seconds. And after I had passed by some little time I heard a boat whistling somewhere in the fog ahead, and I heard her blow several whistles, and all at once I seen the "Indianapolis."

Q. You say "several whistles," what kind of whistles?

A. One whistle of a small whistle. I was looking for a small tow boat—seemingly from the sound of the whistle I thought there was some small boat coming. He was sounding his signals on the small

whistles, and I seen the "Indianapolis" coming out of the fog some three or four hundred feet distant, and he immediately blew his two whistles, signifying that he would pass me to his starboard side—also on my starboard side—and I immediately answered him with two whistles.

Just previous to this I had signalled my fog whistle, indicating that I had a tow. And within just a few second he was directly abreast of me and going very fast, seemingly at full speed. And the mate, or somebody upon the boat—I don't know that it was the mate or the lookout—I heard him distinctly signal to the master or the man at the wheel in the wheelhouse, that there was a scow directly ahead and to keep to port. But, seemingly, they made no effort to stop or change their course whatever, but proceeded right on, and the course that she had would cut my tow line about two hundred feet astern of the "Klickitat" and hit the scow on the port corner, passing on thru the scow and thru the lumber and seemingly as if it were nothing, went right on right thru the side of the scow and hit one of the floats and turned it upside down, and the last I seen of him he was going full speed, and after that I never saw him any more. He never stopped for any assistance.

Q. Did he pass out into the fog again?

A. Yes sir. He kept right on going on his

course, on towards Tacoma, that was the way he was bound.

Q. What did you do then?

A. I immediately backed up and took in the tow line and went alongside the wreckage, and kept on sounding my fog whistle so that other boats would not be apt to run into it, and it was very thick, and of course it was my duty to stand by and see that somebody else did not run into it. I stayed there until some time about a quarter after eight and the fog began to rise. It got clear again and I went on into Seattle and made a report of it in an attempt to get another boat to assist in picking this lumber up, and we afterwards surrounded the lumber with boomsticks, and that same evening we got it back to Port Blakeley, what was left of the scow and the lumber.

Q. Whereabouts did she hit the scow?

A. She hit the scow about six feet from the port corner.

Q. The port forward corner?

A. The port forward corner, and passed on thru the scow.

Q. And how long a cut did she make thru the scow?

A. Approximately seventy-two feet.

Q. You measured it?

A. Yes sir. It took the side right out of the scow.

Q. And what did it do to the lumber?

A. Of course, well it broke a lot of it up and scattered it all over—of course, when the scow sank it floated all over and a lot of it was broken up.

Q. The scow did not sink entirely?

A. Well, the scow was submerged. You could not see the scow whatever. You could see a part of the top of the lumber afloat.

Q. Was assistance obtained from Lillico?

A. Yes, I hired one of the Lillico's boats to come there, and went to Scwager & Nettleton's and got some boom sticks and I came out with the boom sticks and then I went out and assisted him and we surrounded the lumber.

Q. He charged the mill company twenty dollars for that?

A. Yes, I know he was there quite a long time.

CROSS EXAMINATION

Q. (MR. ROBINSON) What time did you leave Port Blakeley?

A. Four forty a. m.

Q. What time did you pass Blakely Rock?

A. It takes thirty minutes to get out there with that kind of a tow, that would be 5:10.

Q. Do you know what time you passed the bell buoy?

A. Yes sir.

Q. What time?

A. 6:40.

Q. When did this collison occur?

A. October 20, 1916.

Q. What time?

A. What time?

Q. At what time?

A. About seven minutes after seven.

Q. What speed could you make with that tow that morning?

A. Well, we were making a little less than four miles an hour.

Q. A little less than four miles an hour?

A. Yes.

Q. You mean statute miles?

A. Yes.

Q. I think you said that you were a little past the buoy when you heard the whistle of the boat ahead of you somewhere?

A. That was some little time after we were past there—oh ,that was about twenty or twenty-three minutes after we had passed the buoy.

Q. Around about seven o'clock then?

A. Yes; a few minutes after seven before I heard any whistles.

Q. About how many minutes past seven?

A. Well, between three and five minutes after.

Q. How long did you hear those whistles before the collision happened?

A. Not more than about three or four minutes —about three minutes.

Q. What speed do you think you were making at the time you first heard those whistles?

A. Well, I was going at the same rate of speed all the time, all the way across.

Q. About four miles an hour?

A. Yes, a litttle less than four miles an hour.

Q. When you heard the whistles you heard several of them between the time you first heard them and the collision?

A. Yes.

Q. How long have you been navigating around this harbor here?

A. Well, I have been working around here since 1909.

Q. You knew the Tacoma boat came out about that time, didn't you?

A. Yes.

Q. You also knew then as you do now, don't you, that she uses her small whistle in a fog?

A. No sir.

Q. That whistle is a loud, clear and adequate whistle, is it not—you have heard it since, haven't you?

A. I don't recall of having heard that whistle since. I have noticed that whistle up on the smokestack there, but I do not recall of over hearing it only at that time.

Q. You heard it quite plainly that morning?

A. Yes, I heard it plain enough that morning.

Q. Did it appear to be blowing at regular intervals?

A. Well ,it seemed to be quite a long time in between the whistles.

Q. How long?

A. Anywhere from a minute to a minute and a half; probably a minute and a half.

Q. How many of them did you hear, do you think?

A. Not more than three.

Q. How large a vessel is the "Klickitat"?

A. Forty-six feet overall, eleven foot beam.

Q. Do you know how long a tow line you had that morning?

A. Yes, three hundred feet.

Q. How long was the scow?

A. The scow was one hundred nineteen feet.

Q. So, if I understand your testimony correctly, you were coming along here at about four statute miles per hour and you heard those whistles out ahead of you somewhere—they seemed to be about forward?

A. Yes, somewhere.

Q. And then the next thing that happened you saw the "Indianapolis" in sight?

A. Yes.

Q. You were still going about that same speed —what did you do then Captain?

A. When I saw him he blew his whistle right immediately; I answered him and now, in order to—

Q. What did you say about his blowing his whistle?

A. He blew two whistles to pass on my starboard side, and I immediately answered. Now, in order to let him pass on that side I had to pull over. I had to bring the boat over to port to get out of his way.

Q. Were you pointing right at him, do I understand you to say?

A. Well, he was bearing down on me kind of from his starboard bow. He was just exactly over my port bow. In passing correctly he should have blown one whistle, according to the positions that we were in. If he had blown his one whistle and passed to the port side—

Q. Did you see him at the time you heard the whistles?

A. Yes sir, I could see him plainly.

Q. How far was he away?

A. Somewhere between three and four hundred feet ;probably farther than that. Distance is hard to judge on the water, especially in a fog.

Q. You say you pulled over?

A. Yes.

Q. And kept on going?

A. Yes.

Q. I suppose you were still going at the time of the impact?

A. No; just before he hit the scow—well, it might be just about the same time I saw he was going to hit her I stopped the engine.

Q. Up to that time you had not stopped tho?

A. No, I was going right on; the scow was drawing directly behind the boat.

Q. Three hundred feet back?

A. Yes.

Q. How many men did you have on that boat, Captain?

A. I had one man for an assistant, a deckhand.

Q. Where were you?

A. I was in the pilothouse.

Q. Where was the other man?

A. He was in the pilothouse also.

Q. He was in the pilothouse also?

A. Yes sir.

Q. Now, you say you did not hear the whistles until about three minutes bfeore you saw the boat —the "Indianapolis"?

A. Well, yes, about three minutes, or thereabouts—it could not have been more than that.

Q. Were you listening for whistles?

A. Yes, I had my head out thru the window and kept my ear wide open.

Q. Doesn't it seem strange to you, Captain, that you would not have heard her all the way across

the Bay from after the time she left the dock?

A. No sir, you would not hear that whistle thru the fog that far. Take it in foggy weather, a whistle does not sound very far sometimes, especially a light whistle.

Q. Do you mean to charge that this is an inadequate whistle for a fog?

A. No sir, I do not mean to charge that it is an inadequate whistle for a fog, but you don't hear a whistle very far thru the fog.

Q. What kind of a whistle have you got?

A. An ordinary air whistle, the same as the rest of those gas boats. We have one hundred fifty pound pressure on the tank, and the whistle can be heard a good long distance.

Q. You said something in your testimony about somebody out on the bow of the "Indianapolis" signalling back to the pilothouse. What was that—I didn't quite catch it.

A. When he was almost directly alongside of the boat, or alongside of the tug, I heard the mate, or the lookout there signal to the person in the pilothouse to swing to port, that the scow, that there was a scow directly ahead.

Q. You say that you heard him signal; what do you mean; did you hear him say those words?

A. Yes sir, he says "Better swing to port—scow directly ahead."

Q. Do you know where he was standing?

A. Yes sir, he was standing right up close to the bow, within about ten or fifteen feet of the stem somewhere.

Q. Not near the pilothouse?

A. Well, I could not say for sure just what position; I know that I saw him up there and I heard him holler out to the Captain, or whoever was up in the pilothouse. I know there was a lookout up there. I would not say just what part of the boat he was on—somewhere between the pilothouse and the bow of the boat.

Q. That tow line you had, what size line is that?

A. Four and a half inch in circumference.

Q. And two men on your boat handled that tow line?

A. Yes sir, one man can handle it nicely.

Q. One man could shorten it up if on occasion it become necessary?

A. Yes, very easily.

Q. How do you handle the engine on your boat —it is a pilothouse control?

A. Yes sir, a pilothouse control.

Q. How does it operate; for instance would the boat necessarily be going ahead when you could hear the exhaust?

A. Sir?

Q. If you shut off your engines could you dis-

connect your engines from your propeller so that the engines can run and the propeller not turn?

A. Yes, certainly, it has a clutch on her.

Q. So the fact that one would be hearing your exhaust, would not necessarily mean that you were going ahead?

A. No sir.

Q. When did you run into the fog?

A. Well, just when I was off the buoy there; it was about a quarter to seven or twenty minutes to seven or thereabouts.

Q. Was it very foggy at that point?

A. The fog laid in banks that morning; there would be a thick bank of fog here, and it would give out and you would be out in the clear.

Q. There were some clear streaks on this side of the Bay?

A. Yes, in towards the Harbor. You would go right along thru the fog and you would not hear a thing, and all at once you would run out into a clear space.

Q. It was a streaky fog then?

A. Yes.

Q. How was it at the point where the collision happened?

A. I was in the clear. It was very clear where I was at the time he ran into the scow. I could see the scow very plain and I could see the "Indianapolis."

Q. You had come thru some thick fog on the way there?

A. Yes.

Q. I understand then that you maintained an even speed right across?

A. Yes.

Q. From the time you left Port Blakeley until the "Indianapolis" got up right abreast of you?

A. Well, until he got up to the scow.

Q. Until he had passed you even?

A. Yes.

Q. And you went thru those fog banks and thru those clear spots, at the same speed?

A. Yes sir. That is very slow. A man could walk as fast as we were traveling.

Q. About four miles an hour?

A. Yes.

Q. Your idea in regard to that is that you were maintaining a moderate speed, within the rules?

A. Yes.

Q. And that was all that was required of you?

A. Yes.

REDIRECT EXAMINATION

Q. (Mr. Stedman). When you left Port Blakeley did you have lights?

A. Yes sir, all the lights were burning at that time, and also the lights on the tow.

Q. Were the lights burning on the scow at the time of the collision?

A. Yes sir; the lights were still burning on the scow.

Q. Did the "Indianapolis" come out of a fog bank towards you?

A. Yes sir, and, seemingly, a kind of fog bank in where he was, and he came kind out of the fog when I first saw him.

Q. He was blowing his fog whistles?

A. Yes sir.

Q. Whereabouts on the "Klickitat" is the pilothouse, or the wheel house?

A. The pilothouse is on the bow of the "Klickitat", at that time.

Q. Within six or eight feet from the bow?

A. Yes, about eight feet from the bow.

THE COURT: Was there lights on the scow?

A. Yes sir, there was the usual lights that we put on the scow, the ordinary lanterns, of course at the time the "Indianapolis" ran into her there was daylight then and the light would hardly be seen.

RECROSS EXAMINATION

Q. (Mr. Robinson). I understood you to say in your direct examination that the "Indianapolis" went right on at full speed and right thru the scow and kept on going—how long did you see her after she passed?

A. After he passed on out past the scow I did

not see him any more. I suppose when he hit the scow he kind of pushed the scow with him a little.

Q. Did you lose sight of the scow for a little while?

A. Yes.

Q. What did you say he didn't stop or slacken speed or anything—how do you know that?

A. Well, I could tell that he did not reverse his propeller or anything. The current from his wheel was pulling up underneath the stern and a great swell on the side of the boat four feet high, just the same as he does in clear weather. I could have reached out with a pike pole and touched him, he was that close—right alongside the boat.

Q. Is it not possible that you are mistaking his reverse motion for his going forward motion?

A. Sir?

Q. I say, is it not possible that you have mistaken his reverse motion for his going forward?

A. No sir. Any time you can see the propeller reversed you know the current from the wheel is setting back in underneath the boat. He never made no effort to stop at all, from what I could see. Of course after he passed on out into the fog there I do not know what he did out there—he may have made some effort to stop.

Q. Did you hear his whistle out there?

A. He just kept on signalling his one whistle.

I heard him whistle a couple of times after he passed me and that was all.

Q. Just one whistle?

A. Just one whistle.

Q. Those floats back of the scow, how large were they—and what were they, timbers or what?

A. They were two floats made up of boom sticks; they were to be used as a walk way between the shore and the construction of some of those new steamers.

(Witness excused).

CHARLES MELGARD, produced as a witness on behalf of Libellant, being first duly cautioned and sworn, testified as follows:

MR. STEDMAN: It is stipulated, may it please Your Honor, that the loss of the Port Blakeley Mill Company is $271.19.

Q. State your full name.

A. Charles Melgard.

Q. What is your business?

A. At the present time I am plane man at Port Blakeley.

Q. What was your business and what were you doing in October 20th, 1916?

A. I was assistant on the tow boat "Klickitat."

Q. Under Oliver Houchen?

A. Under Oliver Houchen.

Q. How long had you been on her then?

A. I was on her two weeks altogether.

Q. How old are you?

A. Thirty-four years.

Q. Do you remember what time you left Port Blakeley on the morning of October 20th?

A. About 4:40.

Q. Did you have a scow in tow?

A. Yes sir, we had a scow and two floats.

Q. What was the name of the scow—the "Dorety D."?

A. The "Dorety D."

Q. Loaded with lumber, was she?

A. Loaded with lumber.

Q. And where were you bound for?

A. Seattle.

Q. What pier do you know?

A. Pier D, I think.

Q. Or Pier 2, was it?

A. Pier 2.

Q. What was the weather as you left Port Blakeley?

A. It was clear as we left Port Blakeley.

Q. When you got off Duwamish Head where did you pass the bell buoy—did you pass between the bell buoy and Duwamish Head?

A. I could not say exactly because I was down for breakfast at the time and I just came up a little before the accident.

Q. You came out a few moments before the accident?

A. Yes sir.

Q. What whistle or whistles were being blown on the "Klickitat"?

A. Oliver blew the regulation whistles—one long and two short blasts.

Q. Indicating that he had a tow?

A. A tow.

Q. How frequently were they being blown?

A. He blowed them pretty regular, I can't say, sometimes about thirty minutes between.

Q. Thirty minutes?

A. Or thirty seconds.

Q. Did you hear any fog whistles from the vessel approaching you?

A. Yes.

Q. How long before he was visible did you hear it?

A. About three minutes, I think.

Q. How far was the "Indianapolis" when you first saw her?

A. Well, that is pretty hard for me to judge on the water. I should say about three or four hundred feet.

Q. What if any signal did she give to you?

A. Well, as soon as he seen us he blowed two whistles to pass on the starboard side.

Q. What did Oliver do?

A. He answered with two whistles.

Q. Which side of you did she pass?—the starboard side?

A. On the starboard side, yes.

Q. How close aboard?

A. Well, she was pretty close when she was abreast of us.

Q. Did you see any signal or anything from the look-out on the "Indianapolis" or the man on the bow?

A. I seen a man on the bow of the "Indianapolis" thru the window in the pilothouse.

Q. Did you hear what he said?

A. I did not hear what he said because the window was shut on that side that I stood on, and Oliver was leaning out thru the other window.

Q. Talk louder.

A. I stood inside the pilothouse there and looked thru the window and I seen a man on the bow of the "Indianapolis" making some motion with his hand up to the Captain.

Q. What motion was it?

A. Some motion like this (showing) with his hand. I could not tell exactly when I was looking thru the window.

Q. You do not know how he motioned him to go?

A.I could not swear to that.

Q. How, after she passed you, what did the "Indianapolis" do?

A. Well, she went right by and we never seen her any more.

Q. Did she cross the tow line?

A. She crossed the tow line.

Q. What did she do to the scow, if anything?

A. She took the corner out of the scow.

Q. Did she stop?

A. No, she didn't stop.

Q. Could you tell if she passed by you if she was under way or whether she was reversed—whether she was going forward or engines reversed?

A. She was going ahead.

Q. The engines were going?

A. Yes.

Q. The wheel was going?

A. Yes.

Q.The propeller was going froward?

A. Yes.

Q. What did you do after the collision?

A. Well, we turned around and went back and stood by the scow.

Q. Did you keep sounding fog whistles?

A. Yes.

CROSS EXAMINATION

Q. (Mr. Robinson). Have you worked on tow boats much?

A. No sir, that was the first time I was on a tow boat.

Q. You had been on there about two weeks?

A.Yes.

Q. How much sea experience had you had up to that time?

A. Well, I had a little experience at home in the old country, in Norway.

Q. But you had not worked on a vessel over here at all?

A. No sir.

Q. And you had been there about two weeks?

A. Yes.

Q. And there were two of you on the vessel?

A. Yes.

Q. Yourself and the Captain, who just testified?

A. Yes.

Q. I believe you said you were down at breakfast when you passed the bell buoy out there?

A.Yes, I was at breakfast when we passed the bell buoy.

Q. And you came up a few minutes before the collision?

A.Yes.

Q. About how long?

A. About ten minutes before.

Q. What was the weather like when you came up?

A. It was kind of a fog.

Q. It was foggy when you came up?

A. A fog coming kind of in bunches then.

Q. When you came up from breakfast was the fog about the same as it was when the collision occurred, in density?

A. Not quite so dense, no.

Q. How far could you see at that time?

A. Well, I could plainly see the scow when I came up.

Q. Then you could see at least three hundred feet?

A. Yes.

Q. When you came up from breakfast?

A. Yes.

Q. How long had you been down there?

A. I think I was down there about a half an hour.

Q. You went down then before you passed the bell buoy and came up sometime this side?

A. Yes.

Q. This man you talked about making some signal on the bow of the "Indianapolis"; was that well up towards the stem, or right by the pilothouse, or where?

A. Well, some place between the stem and the pilothouse.

Q. Can you give me any idea how far it was from either point?

A.I could not say for certain—about half ways between.

Q. It was not right by the pilothouse window?

A. Not on top there—it was down on the lower deck.

Q. How much experience did you have in the old country as a sea man?

A. Once in a while—I didn't work at that steady, you know.

Q. What sort of work was it—was it towing or on a freight vessel or on a fishing vessel or what?

A. A freight vessel—steamers.

Q. Where was this?

A. In Christiania.

Q. Norway?

A. Yes.

Q. Can you give us some idea how much experience you had?

A. Altogether, about six months.

Q. How long ago was that?

A. Well, thirteen or fourteen years ago.

(Witness excused).

MR. STEDMAN: I do not remember whether Mr. Houchen made it clear in his testimony that they passed about half way between the bell buoy and Duwamish Head—I would like to ask him a question.

OLIVER D. HOUCHEN, recalled, testified as follows:

Q. Captain, I don't know whether I asked you or not, but if I did I will ask you to tell me again

how far those floats projected behind the scow—how far they tailed out behind?

A. Each of those floats were approximately eighty feet long and they were coupled close together.

Q. And coupled close to the scow?

A. Yes, just a short line in between them and the scow.

Q. And your boat was forty-six feet?

A. Yes.

Q. And three hundred feet of tow line?

A. Yes.

Q. And 119 feet of scow?

A. Yes.

Q. And two eighty foot floats coupled close together behind them—now how much did you say the scow was?

Q. That is 119 and the two eighty-foot floats behind that?

A. Yes.

Q. (Mr. Robinson). How long have you towed around here?

A. I have been towing around the Sound since 1909.

Q. Is it not customary when you come into the Harbor to shorten up the tow line of that length?

A. No sir, it is not, because most of the boats using tow lines—most of them use anywheres from four hundred and fifty or probably six hundred

feet of the tow line and lots of times they never take those up, because you will see them towing out in the Harbor with the towline right out, especially a log raft.

Q. Do you consider it good seamanship to come in with a tow of that length, a scow and those drags behind and everything, in a fog, into the Harbor?

A. Yes, because you are blowing that signal, and anybody approaching you, it makes no difference from what course they are coming, they know you have a tow and they must be on the lookout; they don't know whether you have a tow or a log raft. If the boat has a raft of logs behind, even if they shorten their tow line the raft of logs will probably be a thousand feet long.

Q. What is the towing signal?

A. One long and two short blasts.

Q. What do you mean by a long whistle?

A. Three seconds duration for the long one and somewhere about ten seconds for the short one.

MR. ROBINSON: That is all.

MR. STEDMAN: You made a marine protest on this?

A. Yes.

Q. First by affidavit and also extended it by marine protest?

A. Yes I did.

MR. STEDMAN: I offer this in evidence.

MR. ROBINSON: I am willing to admit that

the protest was made; the fact that the protest was made I think is admissible, but I do not think the protest itself is. I think the most it can show is that the protest was made, which I am willing to admit.

MR. STEDMAN: The authorities vary as to that, but perhaps it would show that the statement at the time it was fresh in his mind is the same as what it is now.

THE COURT: It may be admitted. I am not saying that the Court will consider the statement. The fact that the protest is admitted, perhaps, would answer every purpose.

MR. STEDMAN. The libellant rests. That is all. That is the case of the libellant and the intervening libellant, the Port Blakeley Mill Company.

HERE THE LIBELLANT RESTS.

HOWARD PENFIELD, produced as a witness on behalf of Respondent, being first duly cautioned and sworn, testified as follows:

Q. (Mr. Robinson). State your full name.

A. Howard Penfield.

Q. Captain Penfield you are a master mariner?

A. Yes sir.

Q. What license have you, and how long have you had it?

A. Puget Sound and tributaries and Puget Sound waters.

Q. How long have you had it?

A. Fifteen years.

Q. You have been going to sea how long?

A. All my life, thirty years.

Q. How old are you?

A. Fifty-seven in September.

Q. You were master of the steamship "Indianapolis" on the morning of this collision that we are talking about?

A. Yes.

Q. What time did you leave the Colman Dock?

A. 7:00 a. m., October 20.

Q. Where is the Colman Dock with reference to Pier 2?

A. It is north.

Q. North of Pier 2?

A. Yes.

Q. After she steamed into the Bay coming directly from the neighborhood of the bell buoy to Pier 2, what would your course be with reference to that?

A. Practically head-on.

Q. That is, because, I take it, that you go down to about Pier 2 in making the turn?

A. Yes.

Q. What was the weather like that morning?

A. Foggy.

Q.Can you describe it more particularly; would you say that it was a thick fog and very foggy or what?

A. Well, it was pretty thick.

Q. What time did you get on your course after leaving the dock?

A. 7:04.

Q. 7:04?

A. Yes.

Q. About what time did this collision occur?

A. About 7:07—it may have been 7:08.

Q. Or 7:07½?

A. Yes.

Q. At what point did it occur, how far off the dock, do you think?

A. Probably a mile! in the neighborhood of a mile.

Q. How were you going with regard to speed that morning?

A. We were making one hundred thirty-five revolutions.

Q. That would carry you along at a pretty good clip?

A. Yes.

THE COURT: About how many miles?

A. Very near fifteen miles an hour.

Q. (Mr. Robinson). Is that statute or nautical miles?

A. Nautical miles.

Q. About fifteen?

A. Yes sir.

Q. How much could the "Indianapolis" make

at that time if she were running full speed?

A. Practically the same.

Q. About the same?

A. Yes sir.

Q. What revolutions does she make when she is going full speed?

A. One hundred fifty-two.

Q. There must be some difference between one hundred thirty-five and one hundred fifty-two, is there not?

A. In regard to the revolutions?

Q. In regard to the speed.

A. Not materially, no sir.

Q. Were you blowing your fog whistle?

A. Yes sir.

Q. What whistle did you use for the fog whistle —you have two fog whistles?

A. We have a small whistle, yes sir.

Q. What can you say about the carrying powers of that whistle?

A. Well, it is a very shrill whistle, sharp and clear, and it carries a great distance—distinct.

Q. Have you ever been ashore and heard it for any considerable distance so that you can judge of the distance you can hear the whistle?

A. Yes.

Q. In what way?

A. Well, I have heard it where I live very often.

Q. How far would it be from the waterfront?

A. It is about a mile and three-quarters.

Q. That whistle is only used in foggy weather?

A. Yes.

Q. Were you in the pilothouse?

A. Yes.

Q. The windows down?

A. Yes.

Q. And the quartermaster with you?

A. Yes.

Q. Was there anybody ahead of you on the boat?

A. Yes.

Q. Who?

A. The first officer and the man on the lookout.

Q. Where was the first officer?

A. He stood directly in front of the pilothouse.

Q. Near the pilothouse?

A. Yes.

Q. Where was the other man?

A. He was practically in the same position on the other side, on the starboard side—the mate was on the port side.

Q. He was down on the other deck?

A. They were both on the boat deck.

Q. What was the first intimation that you got that there was something ahead of you that morning?

A. Three short toots of a whistle, I took it for a towing whistle.

Q. You took it for a towing whistle?

A. Yes sir.

Q. When did you hear that, do you think?

A. Well, that was about—it was in the neighborhood of 7:06½, or something like that.

Q. It was pretty shortly before the collision?

A. Yes sir.

Q. What did you do?

A. I stopped the engines.

Q. And what next?

A. Well, I blew the fog signal. I got no response and I blew it again—possibly five or six seconds between them—and I got no answer, and instead of a whistle I heard the exhaust from the gas boat.

Q. Where was the exhaust with reference to you?

A. Practically right ahead.

Q. Right ahead?

A. Yes.

Q. You heard the cross examination and some of the testimony here this morning?

A. A portion of it.

Q. Did you hear that portion with reference to your blowing a starboard passing whistle?

A. I blew a starboard passing whistle.

Q. You blew two whistles?

A. Yes.

Q. Why did you do that?

A. To pass the starboard. I saw him on the starboard bow.

Q. Did he answer that?

A. No sir.

Q. What were your engines doing when the collision took place, Captain?

A. They were reversed.

Q. What did you do after the collision?

A. After the collision I blew several times the fog whistle and I sent the mate down below to see if everything was all right, and then I proceeded on the way to Tacoma.

Q. Could you see the scow or any part of her at that time?

A. At that time, no sir.

Q. Did you hear any call or anything from the tug?

A. No sir.

Q. Did you know whether or not you had passed clear of the tug?

A. Yes.

Q. Did you see anybody on the scow?

A. No sir.

CROSS EXAMINATION

Q. (Mr. Stedman). Captain you knew you hit the scow, didn't you?

A. Yes sir.

Q. You cut a sliver off her?

A. Yes.

Q. Cut right thru her?

A. I don't know whether I went thru her or not. I took off the corner of the scow.

Q. You knew you hit her on the front port?

A. Yes.

Q. Near the port corner?

A. Yes sir.

Q. And you took a sliver about seventy or seventy-five feet long?

A. Yes.

Q. Now your berth at the Colman Dock is the south berth nearest the end of the dock?

A. Yes sir.

Q. It is where the Tacoma boats usually land?

A. Yes sir.

Q. In leaving Seattle, you, of course, backed out from your berth?

A. Yes.

Q. On what wheel?

A. On her regular wheel.

Q. To the port or the starboard—on what helm?

A. The helm is amidships.

Q. How far do you go in that direction?

A. I probably backed out only one hundred or one hundred and twenty feet.

Q. How long do you go on that course in a fog?

A. Backing out from the dock I generally back out until I lose sight of the dock.

Q. Did you lose sight of the dock this morning?

A. Yes sir.

Q. Then what course do you take?

A. Well, I put my helm hard-to-port and head half speed and slow sometimes.

Q. And you make a swing around to port?

A. Yes sir—around the port helm.

Q. Around to starboard?

A. Yes.

Q. You get about opposite Pier D, don't you?

A. Yes, in that neighborhood, off Pier 1 or Pier D.

Q. Pier D is perhaps, three or four blocks south of the Colman Dock?

A. Yes.

Q. And then you swing around so as to go on your course?

A. Yes.

Q. Your course is outside and to the north of the bell buoy?

A. Practically at the bell buoy. I make the bell buoy very close.

Q. You do not aim to be to the south or inside the bell buoy, do you?

A. Sometimes I am.

Q. What was your course this morning?

A. Well, it was my regular course.

Q. Your regular course is at the bell buoy or just outside of it?

A. Yes; sometimes we are carried a little inside.

Q. It depends on the tide?

A. The tide don't affect her a great deal—a little bit.

Q. At the time of this collision you were going at substantially full speed?

A. At the time of the collision, no sir.

Q. How many revolutions were you making?

A. At the time of the collision?

Q. Yes.

A. I was reversed.

Q. How long had you reversed at the time of the collision?

A. Before the collision?

Q. Yes.

A. I had been backing, probably, well, I could not say—quite a space of time; maybe six or seven or eight seconds, or something like that.

Q. Six or seven or eight seconds?

A. In that neighborhood.

Q. You had no difficulty in going thru the scow, did you?

A. In going thru?

Q. It did not retard your progress any to speak of?

A. I don't know about that.

Q. Well, you went right ahead on your course after that, didn't you?

A. No sir.

Q. Did you lay-to?

A. Yes. I came to a dead stop.

Q. Did you come back to where the scow was?

A. No sir.

Q. The scow was out of sight?

A. Yes.

Q. You came to a stop to see whether you were hurt or not?

A. Yes sir.

MR. STEDMAN: That is all.

(Witness excused).

PETER WICK, produced as a witness on behalf of Respondent, being first duly cautioned and sworn, testified as follows:

Q. (Mr. Robinson). Mr. Wick, you are a licensed mariner?

A. Yes sir.

Q. You are the mate on the "Tacoma" at the present time for the Puget Sound Navigation Company?

A. Yes sir.

Q. At the time this collision occurred you were mate on the "Indianapolis" were you not?

A. Yes sir.

Q. How long have you been going to sea?

A. About thirty years.

Q. Where were you when the "Indianapolis" pulled out across the bay that morning?

A. I stood on the starboard side on the upper

deck in front of the pilothouse, six feet from the pilothouse.

Q. Were you giving fog signals?

A. Yes sir.

Q. What was the first seen or heard of this matter that afterwards proved to be the scow?

A. I heard a gas boat somewhere ahead giving out whistles—it sounded like a discharge.

Q. How many times?

A. I heard it once.

Q. And what happened next?

A. The next I heard the exhaust.

Q. Where was that with reference to you?

A. Well, it was—it sounded as if it was a little on the starboard bow, mostly ahead—nearly right ahead, and then I saw him.

Q. Then you saw him shortly after that?

A. Yes sir.

Q. How long was it between you heard the whistle and the time you saw the "Klickitat"?

A. It must have been about one minute I guess.

Q. And where was he when you saw him?

A. I saw him right down on the starboard side.

Q. Abreast of you?

A. Abreast of where I was standing.

Q. Abreast of where you were standing?

A. Yes.

Q. About how far away?

A. I don't know; it must have been ten feet away or twenty feet; he was very close in.

Q. Did you call the attention of the Captain to any of those things you saw or heard?

A. I reported when I saw the scow.

Q. When you saw the scow?

A. Yes.

Q. You have been in the courtroom here all the morning?

A. Yes.

Q. You heard the testimony that somebody told the Captain to go to port; did you do that?

A. No sir. I gave him no directions at all. I said "There is a scow right ahead."

Q. Tell us, if you know, what the Captain did when you reported the scow, or do you know?

A. He answered that he saw it. Or said "All right" or something. I said "There is a scow right head." I don't know what he did.

Q. What do you know as to whether or not he gave any signals to the engine room?

A. Well, I heard the bells ringing.

Q. Do you know what bells they were?

A. No sir, I could not tell.

Q. Do you know or had you any way of telling whether or not the "Indianapolis" slackened speed between that time and the time she hit the scow?

A. Yes.

Q. How could you tell that?

A. You can easily feel that when you are standing out on the open deck in the fog, whether she is going full speed or not, and you can feel every motion of the boat.

Q. Do you know whether or not your boat stopped after she passed thru this scow?

A. She stopped dead after we passed thru the scow.

Q. Did you stay around there any length of time, or what did you do?

A. Not very long. We stood around two or three minutes, I guess and then started up again.

CROSS EXAMINATION

Q. (Mr. Stedman). The first you saw of the tug was when she was right alongside you?

A. Yes.

Q. And about ten feet from you?

A. Well, maybe it was twenty.

Q. Pretty close to you?

A. Very close.

Q. It seemed like you could touch her with a pike pole?

A. Not quite that close.

Q. You reported to the Captain that there was a scow in tow?

A. Yes.

Q. And then the Captain gave the signal to reverse the engines?

A. Well, I don't know what signal he gave.

Q. But the signals he gave, he gave after you reported the scow?

A. I don't know all the signals that were given, but I heard him give some signals.

Q. How soon after that was it that you struck the scow?

A. It was almost right away.

Q. Almost immediately?

A. Almost immediately.

Q. How long is the "Indianapolis"?

A. I believe that she is—I don't remember.

CAPTAIN PENFIELD: One hundred eighty feet long.

Q. (Mr. Stedman). When you stopped, after striking the scow, could you see the scow?

A. No sir, she disappeared.

Q. Out of sight in the fog?

A. Yes.

Q. It was quite foggy?

A. Yes, pretty foggy.

Q. Before you saw the "Klickitat" alongside of you the "Indianapolis" was going at her regular rate of speed?

A. She was going very slow.

Q. She had gone very slowly after she had left the dock?

A. She was not going full speed at any time, as far as I understand.

Q. She was not going full speed at any time as far as you understand?

A. No sir.

Q. You don't know what time this happened?

A. No sir, only what I heard. I didn't take any time.

(Witness excused).

CHRIS LARSEN, produced as a witness on behalf of Respondent, being first duly cautioned and sworn, testified as follows:

Q. (Mr. Stedman). Mr. Larsen, where do you live?

A. 3811 North 13th Street, Tacoma, Washington.

Q. Who are you working for at the present time?

A. The Glacier Fish Company.

Q. You used to work for the Puget Sound Navigation Company?

A. Yes sir.

Q. How long ago was that—when did you quit there?

A. Well, I don't know what time I did quit on the "Indianapolis."

Q. Roughly, how long did you work for the Puget Sound Navigation Company?

A. The last time I worked there was last summer I was working on the "Tacoma."

Q. Six or eight months ago or something like that?

A. Something like that, I don't know exactly.

Q. Now, you were employed by them and were on this vessel the "Indianapolis" the morning on which this collision took place?

A. Yes sir.

Q. Where were you?

A. I was supposed to be on the look-out on the port side.

Q. Were you there?

A. I was there.

Q. Where were you standing with reference to the stem of the boat?

A. Just about as close as I could get up on the port side.

Q. Were you on the same deck with Peter Wick, the same deck that he was on?

A. Yes.

Q. The upper deck on that boat runs away out towards the stem?

A. Not quite.

Q. It runs pretty well out?

A. Pretty well out.

Q. How far were you from Mr. Wicks?

A. About six or eight feet across I guess.

Q. Do you remember of the "Indianapolis" coming into collision with the scow that morning?

A. Yes.

Q. As a matter of fact, there was some lumber flying around in your neighborhood?

A. Yes sir.

Q. What was the first you heard or saw or how did you become conscious that there was something out there in front of you?

A. The first I heard I heard one whistle.

Q. You heard one whistle?

A. One tow boat whistle, and then I knew there was something. That was all I heard.

Q. How long was that before the collision occurred?

A. Well, that is hard to tell; it seems to me it was somewhere around one or two minutes—of course it is hard to tell.

Q. I don't suppose you know anything about what signals were given to the engine room on the "Indianapolis"?

A. I don't know anything about that sir.

Q. Do you know whether the boat slowed down before you were struck?

A. The boat slowed down.

Q. What makes you think that?

A. I could feel it when I was standing on the deck.

Q. Now, just what do you mean by saying that you could feel it?

A. Well, a man can easily feel that when he is on anything moving fast, when it slows down.

Q. When you say you saw this, what did you see first—did you see the tow boat?

A. I saw the tow boat.

Q. Where was she when you saw her?

A. She was just about half past on the starboard bow when I seen the tow boat.

Q. How soon was that after you heard her whistle?

A. Well, it was between the neighborhood of one or two minutes, I can't say that for sure.

Q. How did this whistle sound, did it seem plain to you?

A. Well, just a kind of light whistle, the same as a lot of the tow boat whistles use.

Q. Did you hear it plainly.

A. Well, I didn't hear it—I can't say I heard it very plain, but I heard it that is about all.

Q. But you only heard one set of them?

A. That is all I heard.

CROSS EXAMINATION

Q. (Mr. Stedman). Did you report it when you heard it?

A. No sir.

Q. You thought it was sufficiently loud for those in the pilothouse to hear it just as well as you—where was the "Klickitat" when you first saw her—where was the tow boat when you first saw her?

A. I just about saw the stern of the tow boat passing on the starboard side.

Q. The first you saw here was when you were right aboard her practically—you were on the port side?

A. Yes.

Q. And you saw the stern of the "Klickitat" passing on your starboard and then you were taking crossing courses?

A. Then I saw the tow line.

Q. You ran right across the tow line?

A. And then I knew there was something coming and I looked on and I saw the white water first and then I saw the scow.

Q. Did you strike the scow—whereabouts?

A. Well, it looked to me like we struck about one corner of her.

Q. And you cut off a wedge shaped sliver off her?

A. That was the way it looked to me; I don't know for sure.

Q. You were on the port side and you went to the rail when you struck, to see what happened?

A. I just grabbed hold of the railing to be sure to stay there.

Q. So that you would be sure that you would stand up for?

A. Yes.

Q. And you looked over the rail and you watched the scow as you sliced off the corner?

A. Yes.

Q. And then the scow passed out of sight before you stopped?

A. Well, it was foggy and I didn't see where the scow went to.

Q. Did you go right ahead towards Tacoma?

A. We stopped after we passed the scow.

Q. To see what was the trouble with the "Indianapolis"?

A. And then the Captain sent me down to see if the boat was damaged.

Q. To see if the "Indianapolis" was damaged?

A. Yes.

Q. And you found that she was not hurt?

A. She was all right.

Q. And then you went ahead?

A. Then she went ahead.

Q. Do you know what time you arrived in Tacoma?

A. No. It must have been about the same as usual. I don't know. When it was foggy we used to be kind of short of time.

Q. About the usual time?

A. Well, our usual time was one hour and forty minutes, but in foggy weather we lost out about five or ten minutes.

(Witness excused).

SAMUEL THORN, produced as a witness on behalf of Respondent, being first duly cautioned and sworn, testified as follows:

Q. (Mr. Robinson). You are a marine engineer, are you not?

A. Yes sir.

Q. In the employ on the Puget Sound Navigation Company?

A. Yes sir.

Q. How long have you had a license?

A. About twenty years.

Q. You were the first assistant engineer on the "Indianapolis" on the morning when the collision occurred?

A. Yes sir.

Q. You were on duty at that time?

A. Yes.

Q. Did you feel the shock of the impact?

A. Yes.

Q. What were your engines doing at the time?

A. We were backing.

Q. Backing?

A. Yes.

Q. What had been your last previous signal before the backing signal?

A. To stop.

Q. How long before the backing signal was the stop signal, do you think?

A. Probably a minute.

Q. And how long had you been backing?

A. We had been backing about a half a minute.

Q. These are approximations?

A. Something like that; that is an approximation.

CROSS EXAMINATION

Q. (Mr. Stedman). Did you see the "Klickitat" at all from where your station was?

A. No.

Q. You would not say that Captain Penfield was in error when he said awhile ago that he had been backing probably five or six seconds when the impact came?

A. No sir.

Q. You certainly had not lost your headway when the impact came?

A. No sir.

Q. How long after the impact was it that you came to a stop before you got the signal to go ahead?

A. After the impact?

Q. Yes.

A. I think about two minutes.

Q. You kept a log didn't you?

A. Yes.

Q. Have you got that with you?

MR. ROBINSON: Yes.

THE WITNESS: The log will show.

MR. ROBINSON: The pilothouse log is also here if you want to use it.

Q. (Mr. Stedman). You are testifying from your memory as refreshed from the log?

A. Yes.

Q. (Mr. Robinson). You made those entries yourself?

A. I made those entries myself.

Q. At the time?

A. Yes.

MR. ROBINSON: That is all.

HERE THE RESPONDENT RESTS.

GUS SMITH, produced as a witness on behalf of Libellant in Rebuttal, being first duly cautioned and sworn, testified as follows:

Q. (Mr. Stedman). State your full name.

A. Gus Smith.

Q. And you and your wife are the owners of the "Klickitat"?

A. Yes.

Q. What power engine has she?

A. Seventy-five horsepower.

Q. How long is she?

A. Forty-six feet.

Q. She is used and was used in towing in October, 1916?

A. Yes sir.

Q. What kind of a whistle did she have?

A. Well, just the same as any other gas boat engine.

Q. It could be heard well, could it?

A. Yes.

Q. Was she equipped with lights?

A. Yes.

(Witness excused).

HERE BOTH SIDES REST AND THE TESTIMONY IS CLOSED.

ORAL DECISION BY THE COURT

THE COURT: I do not think this rule Sixteen applies to the "Klickitat" in this case, and I do not think that the circumstances as they have been detailed really bring the "Klickitat" within the rule.

The testimony shows, as I recollect it—and I do not think there is any difference in that—that the master of the "Indianapolis" heard the whistle of the tug with the tow and recognized it. The "Klickitat" was recognized by the look-out on the "Indianapolis"—and the master of the "Klickitat" likewise noticed the "Indianapolis" coming out of the fog; if there had been a collision between the tug itself and the "Indianapolis" it would be an entirely different proposition.

But here we have the "Klickitat" with the scow and the other floats, and the master of the "Indianapolis" advised of just what he was meeting by the signals that were given and likewise by the look-out; the master of the "Indianapolis," as has

been admitted, was going at an immoderate speed and after the signal to stop was given a minute elapsed before the signal to reverse was given, as testified to by the marine engineer.

I do not find anything in the facts disclosed which would charge the master of the "Klickitat" with an omission of duty, and I think that the Court must find that the fault is with the "Indianapolis," and that will be the order.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 7, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

STATE OF WASHINGTON, COUNTY OF KING—ss.

O. D. Houchen, being first duly sworn, on his oath, deposes and says:

That he is Master of the Gasoline Tow Boat "Klickitat," of Port Blakely, and has been such for more than five years.

That he left Port Blakely on October 20, 1916, at 4:40 A. M. That the scow "Dorothy D" was in tow with two floats, eighty feet long astern of said "Dorothy D." That said scow "Dorothy D." is 30x119 feet.

That the weather was clear. That affiant could see Alki Light at all times after leaving Blakely until he arrived off the buoy at Duwamish Head,

at about 6:40 A. M. at which time it was dawning. That when affiant passed Blakely Rocks to the Northerly of said Blakely Rocks affiant took a course, by the compass on the "Klickitat," of Northeast by East one-half East, which, with the tow and the run of the tide, would bring affiant directly into Pier No. 2 of the Port of Seattle, to which pier affiant was bound with said tow. That said floats astern of said tow were thereafter to be taken by affiant to the plant of the Skinner & Eddy Corporation in Massachusetts Street.

That affiant passed the buoy to the South of the buoy about one-half way between the buoy and Duwamish Head. Affiant took such course so as to avoid the course of passing steamers which take a course entering and leaving the harbor of Seattle outside or to the North of said buoy. When affiant was about abreast said Duwamish Head and about half way between said Duwamish Head and said buoy, the weather thickened, and shortly became very foggy; still it was not so thick but that affiant could clearly distinguish the scow astern the said "Klickitat" three hundred feet. That as soon as said weather became thick, affiant sounded the usual fog signals of one long and two short blasts, indicating that a steamer had a tow. That said signals were sounded every thirty seconds. That affiant heard whistles which after events developed were from the Steamship Indianapolis, sounded from the

small whistle of said Steamer Indianapolis. About four or five minutes before she came in sight, affiant heard seven or eight whistles from said Steamer Indianapolis. That at about seven minutes after seven, affiant saw the Indianapolis about three hundred feet distant, almost dead ahead going very fast. The Indianapolis gave a passing signal of two whistles indicating that she would pass to affiant's starboard. Just before the Indianapolis gave such passing signal, affiant had given a fog signal of one long and two short blasts. Affiant immediately answered the signal of the Indianapolis by two whistles and put his helm hard a-starboard. The Indianapolis almost immediately was alongside and only about thirty feet distant going very fast. Affiant saw the mate who was stationed on the bow of the Indianapolis signal to the officer upon the bridge to go to port, but the Indianapolis did not turn to port but cut affiant's tow-line 200 feet astern of the "Klickitat" and struck the scow "Dorothy D." on the port bow about seven feet from the port forward corner cutting the scow to a length of about seventy feet and spilling a large portion of the load of said scow into the water.

That said scow was loaded with 144,000 feet of lumber consigned to the Kennicott Copper Corporation, at Kennicot, Alaska, and was to be delivered by affiant to the Steamer "Eureka," then in the Port of Seattle. That after cutting through

said scow, the Indianapolis cut the rope attaching the first float to said scow, which was attached to the port stern corner of said scow and turned said float upside down.

That said Steamship Indianapolis did not back or make any inquiry as to the condition of the said "Klickitat" or her tow or, in any manner, offer to render assistance, but continued without interruption upon her course. In fact, affiant never saw said Indianapolis after she hit the scow.

Affiant immediately backed, taking in the tow line and went alongside the wreckage and stood by until the fog raised, sounding fog signals to prevent the danger of other vessels running into said scow or wreckage.

That at about 8:15 the fog had risen to such an extent that there was no danger of collision of other vessels with said wreckage, and affiant left for Seattle to report said accident, and made report of Port Blakeley and also requested report to be made to the Steamboat Inspectors.

Affiant believes that from 75,000 to 80,000 feet of lumber was torn off of the scow by said collision.

Affiant then proceeded with another tug to surround said floating lumber with boom-sticks, and subsequently on the night of the 20th of October towed said floating lumber and said wrecked scow to Port Blakeley.

That a large portion of said lumber was broken

by said Steamship Indianapolis, and affiant cannot state how much lumber was lost until a tally has been made.

That affiant believes that the value of said scow is entirely lost, and that she is rendered useless, and hardly worth towing to port.

That affiant has aboard, as assistant, Charles Melgard, a thoroughly competent and able seaman.

O. D. HOUCHEN.

Subscribed and sworn to before me this 25th day of October, A. D. 1916.

ROSE E. MOHR.

Notary Public in and for the State of Washington, residing at Seattle.

(SEAL)

State of Washington, County of King—ss.

Charles Melgard, being first duly sworn, on his oath deposes and says:

That he, on the 20th day of October, 1916, was assistant to O. D. Houchen, master of the Klickitat, and was on board said Klickitat at the time of the collision between the scow Dorothy D. in tow of said tug Klickitat and the Steamship Indianapolis.

That affiant has carefully read the affidavit of O. D. Houchen, and all the statements contained in said affidavit are true, and affiant swears to the same as fully and completely as if they were set out in full herein.

CHAS. MELGARD.

Subscribed and sworn to before me this 9th day of November, A. D. 1916.

L. B. STEDMAN.

Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Libelant's exhibit No. 1. Filed March 27, 1918. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 3501

FINAL DECREE

CANYON LUMBER COMPANY,
Libelant.

vs.

STEAMSHIP "INDIANAPOLIS", her engines, boilers, tackle, apparel and furniture,
Respondent.

PORT BLAKELEY MILL COMPANY, a corporation,
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY, a corporation,
Claimant.

TUG "KLICKITAT", her engines, boilers, tackle, apparel and furniture,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,
Claimants of "Klickitat."

This cause coming on to be heard upon the application of the libelant and intervening libelant, Port Blakeley Mill Company, and Gus Smith and Amelia Smith, claimants of the Tug Klickitat, said libelant and said intervening libelant being represented by Livingston B. Stedman, of the firm of Hastings & Stedman, proctors for said libelant and

intervening libelant, and claimants, Gus Smith and Amelia Smith, being represented by Roy L. Cadwallader, their proctor, and the Puget Sound Navigation Company, claimant and petitioner, being represented by J. S. Robinson, of the firm of Bronson, Robinson & Jones, its proctors, and the Court being duly advised in the premises.

It is here and now ORDERED, ADJUDGED AND DECREED that libelant, Canyon Lumber Company, do have judgment against the claimant, Puget Sound Navigation Company, and Joshua Green and C. H. J. Stoltenberg, its sureties upon its bond to the marshal in the sum of $2,450.60, together with its costs herein to be taxed by the clerk.

It is further ORDERED, ADJUDGED AND DECREED that the Port Blakeley Mill Company do have and recover judgment of and from said claimant, Puget Sound Navigation Company, in the sum of $292.10, together with its costs herein to be taxed by the clerk.

It is further ORDERED, ADJUDGED AND DECREED that the libel of Puget Sound Navigation Company against the Steamer "Klickitat" be and it hereby is dismissed with costs to be taxed in favor of Gus Smith and Cecilia Smith, claimants of said tug "Klickitat."

To each and all of the above and foregoing, the claimant and petitioner, Puget Sound Navigation

Company, excepts, and its exceptions are hereby allowed.

Done in open court this 1st day of April, A. D. 1918.

JEREMIAH NETERER,
Judge.

O. K. as to form: J. S. Robinson.

Indorsed: Final Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Apr. 1, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 3501

CANYON LUMBER COMPANY,
Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,
Respondent.

PORT BLAKELY MILL CO.,
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,
Claimant.

TUG "KLICKITAT," Etc.,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,
Claimants of "Klickitat."

NOTICE OF APPEAL

To the Canyon Lumber Company, a corporation, Libelant herein, and to Hastings & Stedman, its proctors; and to the Port Blakely Mill Company, Intervening Libellant, and to Hastings & Stedman, its proctors; and to Gus Smith and to Cecilia Smith, his wife, Claimants of the "Klickitat," and to Roy L. Cadwallader, their proctor; and to the American Surety Company

of New York, surety on the release bond of the "Klickitat".

You and each of you will please take notice that the Puget Sound Navigation Company, a corporation claimant of the S. S. Indianapolis and Cross-Libellant against the tug "Klickitat," hereby appeals from the final decree made and entered herein on April 1, 1918, in favor of the Libellant and against the said Puget Sound Navigation Company, and Stipulators for the release of the Indianapolis, in the sum of $2450.60, together with costs, and in favor of the Intervening Libellant against the said Puget Sound Navigation Company and the said Stipulators in the sum of $292.10 with costs, which said decree also ordered the dismissal of the Cross-Libel of the Puget Sound Navigation Company against the tug "Klickitat", with costs, in favor of Gus Smith and Cecilia Smith, Claimants of the said tug, and from each and every part of the said decree to the United States Circuit Court of Appeals for the Ninth Circuit.

BRONSON, ROBINSON & JONES,
Proctor for Puget Sound Navigation Co., Claimant of S. S. Indianapolis and Cross Libellant against "Klickitat"

Due service of the foregoing notice of appeal, after the filing of the same in the office of the clerk

of the above entitled court, is hereby admitted this 7th day of June, 1918.

HASTINGS & STEDMAN,
Proctor for Canyon Lumber Co., Libellant, and Port Blakely Mill Co., Intervening Libellant

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecilia Smith, Claimants of the "Klickitat"

AMERICAN SURETY COMPANY OF NEW YORK,

By LIVINGSTON STEDMAN,
Resident Vice-President.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 7, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY

No. 3501

CANYON LUMBER COMPANY,
Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,
Respondent.

PORT BLAKELY MILL CO.,
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,
Claimant.

TUG "KLICKITAT," Etc.,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,
Claimants of "Klickitat."

ASSIGNMENT OF ERRORS

Comes now the above named Puget Sound Navigation Company, a corporation, Claimant and Cross-Libellant in the above entitled cause, and says that in the record and proceedings in said cause and in the decree made and entered therein on the first day of April, 1918, there are manifest errors in the following particulars:

I.

That the said court erred in finding and decreeing that the S. S. Indianapolis was solely at fault, and in failing to hold that the tug Klickitat was also guilty of faults contributing to the collision.

II.

That the court erred in entering a decree against the Puget Sound Navigation Company, Claimant of the S. S. Indianapolis for the entire damage suffered by the Libellant and Intervening Libellant, and erred in failing to enter a decree assessing one-half of said damage against the Claimants of the "Klickitat."

WHEREFORE, the Claimant and Cross-Libellant, the Puget Sound Navigation Company, prays that the said decree may be reversed, modified and corrected in the particulars herein set out, and such decree entered therein as ordered to have been entered by the said District Court.

BRONSON, ROBINSON & JONES,
Proctors for said Puget Sound Navigation Co.,

Service of the foregoing assignments of errors and receipt of copy thereof, admitted this 7th day of June, 1918.

HASTINGS & STEDMAN,
Proctors for Canyon Lumber Co., and Port Blakely Mill Co.,

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecilia Smith, Claimants of the "Klickitat"

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 7, 1918, Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3501

CANYON LUMBER COMPANY,
Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,
Respondent.

PORT BLAKELY MILL CO.,
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,
Claimant.

TUG "KLICKITAT," Etc.,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,
Claimants of "Klickitat."

PRAECIPE FOR APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

You will please prepare, certify, print and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, the Apostles on Appeal in the above entitled cause, pursuant to the rules of the said Circuit Court of Appeals, including in such apostles the following:

1. A caption exhibiting the proper style of the Court and the title of the cause.

2. The stipulation re. record on appeal and

statement attached thereto, filed in the records in cause on the 7th day of June, 1918.

3. The transcript of evidence and oral decision of the Court attached to the stipulation and statement mentioned in the preceding paragraph, together with any and all exhibits offered in evidences.

4. The final decree made and filed April 1, 1918.

5. Notice of Appeal with admission of service, filed June 7, 1918.

6. Assignment of Errors with admission of service, filed June 7, 1918.

BRONSON, ROBINSON & JONES,
Proctors for Puget Sound Navigation Co., Claimant of S. S. Indianapolis and Cross Libellant against "Klickitat"

Indorsed: Praecipe for Apostles on Appeal. Filed in U. S. District Court, Western Dist. of Washington, Northern Division, June 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

United States District Court, Western District of Washington, Northern Division.

No. 3501

CANYON LUMBER COMPANY,
Libelant.

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,
Respondent.

PORT BLAKELY MILL CO.,
Claimants of "Klickitat."
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,
Claimant.

TUG "KLICKITAT," Etc.,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD

United States of America, Western District of Washington, ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this printed transcript numbered from 1 to 82, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing

of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on appeal to the said Circuit Court of Appeals for the Ninth Circuit from the District Court of the United States for the Western District of Washington.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Appellant for the preparation, certification and printing of the record on appeal issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.) for making record, certificate or return, 140 folios at 15c	$21.00
Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20
Certificate of Clerk to original Exhibit—3 folios at 15c	.45
Seal to said Certificate	.20
Statement of cost of printing said transcript of record, collected and paid	105.00
Total	$127.45

I hereby certify that the above cost for prepar-

ing and certifying record amounting to $127.45, has been paid to me by Proctors for Appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 1st day of July, 1918.

~~FRANK L. CROSBY,~~ F. M. Hasbrouck
Clerk United States District Court.

(SEAL) By Ed M. Lakin,
Deputy

United States District Court, Western District of Washington, Northern Division.

No. 3501

CANYON LUMBER COMPANY,
Libelant,

vs.

STEAMSHIP "INDIANAPOLIS," Etc.,
Respondent,

PORT BLAKELY MILL CO.,
Intervening Libelant.

PUGET SOUND NAVIGATION COMPANY,
Claimant.

TUG "KLICKITAT," Etc.,
Respondent on Cross-Libel of Claimant.

GUS SMITH and CECILIA SMITH, his wife,
Claimants of "Klickitat."

CITATION OF APPEAL

The President of the United States to Canyon Lumber Co., a corporation, Libelant herein; and to Hastings & Stedman, its Proctors; and to the Port Blakely Mill Company, Intervening Libelant; and to Hastings & Stedman, its Proctors; and to Gus Smith and Cecelia Smith, and to Roy L. Cadwallader, their Proctor, Greeting: You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an appeal to the said

Court duly filed in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein the said Puget Sound Navigation Company, a corporation, is Appellant, and you, the said Canyon Lumber Company and the said Port Blakely Mill Company and Gus Smith and Cecilia Smith are Appellees, then and there to show cause, if any there be, why the decree of the United States District Court for the Western District of Washington, Northern Division, in the above entitled cause, dated April 1, 1918, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States of America, this 8th day of June, 1918.
(SEAL)

JEREMIAH NETERER,
Judge of the United States District Court of the Western District of Washington.

Due service of the within Citation after the filing of the same in the office of the Clerk in the above entitled Court is hereby admitted this 8th day of June, 1918.

HASTINGS & STEDMAN,
Proctors for Canyon Lumber Co., and Port Blakely Mill Co.

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecelia Smith.

Indorsed: Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 8, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

No. 3177

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In the United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CANYON LUMBER COMPANY,
PORT BLAKELY MILL COMPANY, and
GUS SMITH and CECILIA SMITH,

Appellees.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

FILED
AUG 26 1913

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellant.

THE ARGUS PRESS SEATTLE

No.....

In the United States
Circuit Court of Appeals
For the Ninth Judicial Circuit

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CANYON LUMBER COMPANY,
PORT BLAKELY MILL COMPANY, and
GUS SMITH and CECILIA SMITH,

Appellees.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellant.

THE ARGUS PRESS SEATTLE

In The United States Circuit Court of Appeals

For the Ninth Judicial Circuit

No.....

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CANYON LUMBER COMPANY,
PORT BLAKELY MILL COMPANY, and
GUS SMITH and CECILIA SMITH,

Appellees.

APPELLANT'S BRIEF

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

STATEMENT OF THE CASE.

On the morning of October 20, 1918, a scow belonging to the Canyon Lumber Company laden with lumber belonging to the Port Blakely Mill

Company, and under tow of the tug "Klickitat," belonging to Gus Smith and Cecilia Smith, was run down by the Puget Sound Navigation Company's steamer "Indianapolis," in Seattle harbor. The Canyon Lumber Company libeled the "Indianapolis" and the Mill Company filed an intervening libel. The Puget Sound Navigation Company claimed its vessel, alleged in its answers that the collision occurred through the fault of the "Klickitat" and libeled the said tug under Admiralty Rule 59. Its owners filed claim and made up issues by answer.

When the matter came on for trial before the Hon. Jeremiah Neterer, Judge of the District Court, it was stipulated that the damages to the Libelant and Intervening Libelant were as alleged in their libels, and that in view of the general allegations of the pleadings, the respective parties might introduce their evidence of fault, the Court to determine at the close of all the evidences upon whom the loss should fall. (Apos. 6.)

It appeared from the evidence submitted on behalf of the Libelants and on behalf of the Claimants of the "Klickitat" that she left Port Blakely at 4:40 A. M., bound for Pier 2 in Seattle. (9). She had in tow, on a three hundred foot hawser, (18), a scow, 30x119 feet (60), to which were coupled two floats 80 feet long (60), one behind the other (9). She proceeded steadily at a little less than four miles per hour. She was manned by her Master, Houchen, and by one deck-hand,

Melgard, who had been so employed for two weeks (25), his previous and only other maritime experience consisting of six months' service on freight vessels in Norway about thirteen or fourteen years ago. (30, 32).

The tug with her long tow passed about midway between the buoy and Duwamish Head at about a quarter to seven (10). At this point she ran into banks of fog, some of which were thick, (21, 22). Melgard was below and had been for one-half an hour, but on coming up, about ten minutes before the collision, could see the scow. (30, 31) He testified that the fog was more dense at the time of collision (31). The Master, however, said that at the collision point, it was very clear. (21) The tug was sounding towing signals on her air whistle at the required intervals, or more frequently. (10).

Some three or four (14, 27) or four or five (62) minutes before she came in sight, the "Klickitat" began to hear the fog whistles of a vessel, which afterwards proved to be the "Indianapolis." They seemed to be about forward "somewhere." (16). Seven or eight of these were heard. (62). The "Klickitat" was then making about four miles an hour, which speed she had made all the way across, through fog banks or otherwise. (22). Her Master paid no especial attention to the advancing whistles and took no action whatever in regard thereto, but proceeded at his regular speed until the collision. He testified that he was maintain-

ing a moderate speed, within the rules, and that this was all that was required of him. (22).

Suddenly the "Indianapolis" came out of the fog bank ahead at full speed, about three or four hundred feet away, (11, 15), bearing down on the "Klickitat," slightly from her starboard bow. (17) She blew two whistles, indicating a starboard passage which the "Klickitat" answered (17). There was a look-out on her bow. (20). With her speed unchecked, she was abreast of the tug in a few seconds (11), passed her within the length of a pike pole (24) with her engines in forward motion (24), crossed the tow line two hundred feet back of the "Klickitat's" stern, struck the scow seven feet inside of the port corner and cut off a wedge shaped piece, 7x70, and disappeared in the fog. (62).

Testimony on behalf of the Appellant was given by the Master, mate, engineer and look-out of the "Indianapolis." It tended to prove, that while the "Indianapolis" was not going at full speed, that she was making about fifteen knots in a fog; (37); that her look-out was on her bow; that her mate was on watch in front of the pilot house, and that her Master was in the pilot house, looking out. (40, 47, 51). All three of them heard one tow whistle a-head (40, 47, 52). The Master stopped her engines (40) and the boat slowed down (47, 52). The mate and the Master heard the tug's exhaust substantially right a-head (40, 52). The look-out saw the tug "about half past the star-

board bow." (53). It appeared to the Master that it would be best to make a starboard passage. He blew two whistles, passed on the starboard side, crossed the tow line about two hundred feet back of the "Klickitat" and collided with the port corner of the scow. The Master and engineer both testified that the engines were in reverse motion at the time of the collision (44, 51). All four men agreed that the "Indianapolis" came to a complete stop after the collision. The Master explained his failure to "stand by," by saying that he knew there was no one on the scow; that he had cleared the tug, and that he could render no assistance. After investigating and finding that his own vessel was undamaged, he proceeded with his passengers to Tacoma. (41).

At the close of all of the evidence, Proctor for the Appellant admitted that the testimony of its own witnesses showed that the "Indianapolis" had grossly violated the "moderate speed" branch of Rule 16, but contended that the "Klickitat" was likewise convicted, by the evidence of its own navigators, of violating the other branch of the Rule; and that it had not met the burden of showing that such violations did not contribute to the collision. He also contended that in view of her long tow and the time and place, that she was insufficiently and improperly manned. (6). The Court held that the evidence showed no omission of duty on the part of the Master of the "Klickitat," but that the "Indianapolis" was solely at fault (60). A decree

was duly entered, allowing the Libellant and Intervening Libellant a full recovery against the Appellant and its stipulators, and dismissing the Appellant's libel against the "Klickitat" with costs. (66). From such decree this appeal has been perfected.

SPECIFICATION OF ERROR.

The decree is erroneous in that it assesses the entire recovery against the Appellant and its stipulators and dismisses the libel against the "Klickitat." This follows as a consequence from the primary error of the trial court in finding as follows:

> "I do not find anything in the facts disclosed which would charge the Master of the "Klickitat" with an omission of duty and I think the Court must find that the fault is with the "Indianapolis," and that will be the decree." (Oral decision, Apostles, p. 60.)

The Court should have found that the evidence showed that the Master of the "Klickitat" repeatedly omitted to perform the statutory duty of stopping his engines and navigating with caution, upon repeatedly hearing, forward of his beam, the fog signals of a vessel, the position of which was not ascertained, and, in view of the fact that it was not shown that such omissions could not have contributed to the collision, should have assessed a portion of the Libelant's and Intervening Libelant's damages against the Claimants of the "Klickitat" and their stipulators. In fact, there is ample evidence to support a finding, that had the Master of the tug seasonably performed his statutory duty

no collision would have or could have occurred.

ARGUMENT.

The navigators of the "Klickitat" were aware that there was a vessel under way in the fog ahead long before the "Indianapolis" came in sight. It is true that both Houchen and Melgard testified at the trial that they heard her signals, but three minutes before she came out of the fog, (14, 18, 27) and the Master said he did not hear more than three whistles (16). This evidence, however, was given more than seventeen months after the event.

Libelants' Exhibit I (60) is a marine protest made under oath by Houchen only five days after the collision. Fourteen days after, Melgard swore on oath that he had read it carefully and that all the statements contained in it were true. (64). The protest contains the following statement concerning the point in question:

> "About four or five minutes before she came in sight, affiant heard seven or eight whistles from said steamer, "Indianapolis." (Libelant Ex. I, Ap. 62.)

This exhibit is a self serving document, obviously prepared for use in case of controversy, as, indeed, the event has proved. The statements therein contained were doubtless made as favorable to the "Klickitat" as the facts would possibly warrant. As between two conflicting statements concerning an event, both freely made under oath, by the very same persons one made a few days after the event and the other made seventeen months thereafter,

the first statement will, of course, be regarded as controlling. We assume therefore that the Court will find that the Master of the "Klickitat" heard at least seven or eight fog signals from the "Indianapolis" before she loomed up a-head.

The Master of the "Klickitat" realized that the vessel, sounding these fog signals, was forward of his beam, and that her position was not ascertained. This is conclusively shown by the following question and answer:

> "Q. So, if I understand your testimony correctly, you were coming along here at about four statute miles per hour, and you heard those whistles out ahead of you, somewhere—they seemed to be about forward?"
>
> "A. Yes, somewhere." (16)

He did not stop his engines, or even slow down but kept on going at about four miles an hour and continued at the same speed even after the "Indianapolis" came in sight and in fact until she collided with the scow. (22)

> "Q. Your idea in regard to this is that you were maintaining a moderate speed, within the rules?"
>
> "A. Yes."
>
> "Q. And that was all that was required of you?"
>
> "A. Yes." (22)

The facts here disclosed remarkably parallel the facts disclosed in the litigation over the Beaver-Selja collision. When the opinion of the District

Court in that cause was handed down, it was received with some doubt in marine circles. When this Court affirmed the decision, the underwriters reprinted the opinion and circulated it among vessel owners with an exhortation to them to post placards in the pilot-houses of their vessels bearing the legend, "STOP MY ENGINES." The decisions of the District Court and Circuit Court of Appeals were afterwards affirmed by the Supreme Court of the United States. The three opinions are reported as follows:

Opinion District Court, 197 Fed. 866.

Opinion Circuit Court of Appeals, 219 Fed. 134.

Opinion Supreme Court, 243 U. S. 291.

Reading the three opinions together, we find that when the Beaver became aware of the Selja three minutes before the collision (197 Fed. 869) she was making, according to her own admission, twelve knots, and according to the Selja, fifteen knots per hour. (219 Fed. 136)

At this time the engines of the Selja were stopped and had been for three minutes. Previous to that time, the Selja had been making but three knots for a period of five minutes. All three Courts held that her proceeding at all in the face of the fog signals ahead was a violation of the Rule. The Supreme Court says with reference to the conduct of the Master of the Selja during this period:

"But even then, when convinced that the

danger signals which he had been hearing repeated at one minute intervals for five minutes were from an approaching steamer 'forward of his beam,' he did not obey the rule by stopping his engines, but contented himself with reducing his speed to slow, not out of deference to the rule of law, but because as he says, 'I considered that six knots was not moderate enough under the circumstances,' and this speed be continued for five minutes longer until ten minutes past 3, when, at length he ordered his engines stopped with the result, he is obliged to confess, that at 3:14, two minutes before the collision, his ship still had steerage way upon her, 'was not quite at a standstill,' and a moment later the crash came."

243 U. S. 297.

The District Court said in referring to the conduct of the Selja:

"She thus not only failed to observe the rule on hearing the first whistle, but repeatedly violated it at practically one minute intervals for the succeeding ten minutes."

197 Fed. 867.

Houchen, the Master of the "Klickitat," violated the Rule, according to his sworn statement, seven or eight times. He knew the on-coming vessel was "somewhere ahead" just as Captain Lie of the Selja did. He thought that "maintaining a moderate speed was all that was required of him,"

just as Captain Lie did, but his position is not as strong as Lie's was for Lie, when the whistles got close, slowed to three knots and then stopped his engines six minutes before the collision, while Houchen maintained his regular speed of about four miles an hour until the very moment of the collision.

At the trial in the District Court, the proctors for the "Klickitat" strongly argued the doctrine of major and minor fault, relying upon the excessive speed of the "Indianapolis." In the Beaver-Selja case, the Beaver was running in a fog at from 12 to 15 knots an hour (219 Fed. 136) yet the District Court said:

> "Nor is there room here for the application of the so-called major and minor fault doctrine. Both vessels were equally at fault. The Beaver violated the first part of Rule 16 by going at an immoderate rate of speed, and the Selja was at fault for failing to observe the latter clause of the Rule. One was as great a breach of duty as the other."
>
> 197 Fed. 869.

This language was not criticised by either of the Appeal Courts. In fact the Supreme Court intimates that a breach of the second part of the Rule may be a greater breach of duty than a breach of the first part thereof.

> "The most cursory reader of this rule must see that while the first paragraph of it gives the navigator discretion as to what shall

be 'moderate speed' in a fog, the command of the second paragraph is imperative, that he shall stop his engines when the conditions described, confront him."

243 U. S. 296.

We submit that in holding that the Master of the "Klickitat" omitted no duty, the Trial Court was seriously in error. The rule of the Beaver-Selja cases applied to the master's own sworn statement, shows that he breached an imperative statutory duty, seven or eight times.

NO SHOWING THAT THE "KLICKITAT'S" BREACHES OF DUTY DID NOT CONTRIBUTE TO THE COLLISION.

This Court said in its opinion in the Beaver-Selja case:

> "As pointed out by the Trial Court, the law is that, where a vessel has committed a positive breach of statutory duty, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so."

219 Fed. 138.

This rule is also quoted in the Supreme Court opinion. As no attempt whatever was made to make such a showing, this is as far as it is necessary for us to go. It may be well to point out, however, that so far from the "Klickitat" having sustained that burden, it is perfectly apparent that had she observed the statutory rule the "Indianapolis" would have necessarily passed the point of collision before she reached it.

The vessels were, as shown in the evidence, on slightly crossing courses. The testimony of all six witnesses agreed that the "Klickitat" herself had just reached the point of intersection when the "Indianapolis" came out of the fog bank three hundred feet away. The look-out of the "Indianapolis" says when he caught sight of the "Klickitat," she was just "half-past" their bow (53). The "Klickitat" could not have materially changed her position or the position of the scow in the very few seconds it took the "Indianapolis" to cover three hundred feet. The "Indianapolis" judged it best to attempt a starboard passage. This bending her course to port would diminish the angle between the courses, yet even while swinging to port, she crossed the tow line two hundred feet back of the tug and struck the scow seven feet inside the port corner. It follows conclusively that had the tug been where the scow was, there could have been no collision for the "Indianapolis" even though bending her course to port, passed eight feet to starboard of the center line of the scow. It is almost a foregone conclusion that had the tug advanced but one hundred feet less than she actually did, that the "Indianapolis" would have had a clear way across her bow. In fact, as it was, the Master of the "Klickitat" claims that the "Indianapolis" should have taken that course (17). Furthermore, as it was fairly clear where the tug and tow were, she would have had four hundred instead of three hundred feet to manoeuver in.

The "Klickitat" was making four miles an hour. In the four or five minutes after she first heard the fog signals of the "Indianapolis," she therefore advanced 1408 feet or 1760 feet as the case may be, that is, from a fourth to a third of a mile. She could not possibly have reached the intersection had she stopped her engines on the first, second, third, or even the fourth fog signal, for the heavy square nosed scow, laden with 144,000 feet of lumber with the two big floats trailing out behind, would have of necessity become a drag upon her at once. Had the tug cut down the distance it actually made by even a fifth, the collision could not possibly have occurred, and it is practically certain that it would not have occurred had it cut down the distance even a tenth.

For the foregoing reasons, we respectfully pray that the decree appealed from, be reversed and that the Court order a new decree to be entered assessing one-half of the damages against the Claimants and Stipulators of the "Klickitat" and that the Court will make such orders in regard to costs as to it may seem just.

Respectfully submitted,

IRA BRONSON,
J. S. ROBINSON,
H. B. JONES,
Proctors for Appellant.

No. 3177.

In the United States Circuit Court of Appeals

For the Ninth Judicial Circuit

PUGET SOUND NAVIGATION COMPANY, a corporation,

Appellant,

vs.

CANYON LUMBER COMPANY, PORT BLAKELY MILL COMPANY, and GUS SMITH and CECELIA SMITH,

Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEES.

H. H. A. HASTINGS,
LIVINGSTON B. STEDMAN,
Proctors for Appellees Canyon Lumber Company and Port Blakely Mill Company.

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecelia Smith.

Office and Post Office Address, 64 Haller Building, Seattle, Washington

THE ARGUS PRESS SEATTLE

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

The statement of the case given by the proctors for appellant is in the most part accurate, but naturally colored from appellant's viewpoint.

The statement contained on page 6, however, to the effect that the "Indianapolis" was not going at

full speed is in conflict with the Master's own testimony. (Apos. pp. 37 and 38.) From the viewpoint of the appellees, we will briefly submit the following statement of the case.

The "Klickitat" was proceeding from Port Blakely to Seattle with the scow "Dorothy D" and two floats in tow. (Apos. p. 9.) The weather was clear (9). The tow line was 300 feet long (18). The tug passed out of Port Blakely Harbor leaving the Blakely Rocks to the starboard or to the south (9), and took a course for Pier 2 in Seattle. At Duwamish Head (Luna Park), the tug and tow were about half way between the bell-buoy and Luna Park (10), in order to avoid steamers entering and leaving Seattle Harbor, such steamers generally going outside or north of the bell-buoy (10). When the tug was abreast the bell-buoy, a fog bank settled down, and the tug gave, at thirty-second intervals or more frequently, fog signals of one long and two short blasts, signifying that the boat was coming with a tow (10). After passing the bell-buoy sometime, the Master of the tug heard a small whistle ahead, blowing fog signals (10), and he saw the "Indianapolis" 300 or 400 feet ahead (11). The "Indianapolis" blew two blasts of her whistle, indicating a starboard passing, and the tug immediately answered with two whistles, having, just before hearing the "Indianapolis' " passing whistles, given the fog towing whistle (11). In a few seconds, the "Indianapolis" passed the tug seemingly at full speed, very close (11). The Master of the "Indian-

apolis'' admitted he was going at full speed before he saw the tug (37-38). The ''Indianapolis'' cut across the tow-line of the ''Klickitat'' about 200 feet astern the tug, striking the scow six feet from the port forward corner and cutting a wedge-shaped slice 72 feet long (12, 54). The ''Indianapolis'' went right on after finding that she was not hurt, without attempting to ascertain the damage done excepting to herself. (Testimony of Master of tug, Apos. 11 and 12; testimony of Master of ''Indianapolis,'' Apos. 44 and 45.) After the ''Indianapolis'' gave the starboard passing signal, she reversed her engines and passed to port (41). The mate of the ''Indianapolis'' was on the pilot-house deck on the port side, and the look-out was on the same deck on the starboard side, according to the Master's testimony (39). According to the mate's testimony, he, the mate, was on the starboard side of the pilot-house (45). The mate heard the tug signal only once, a minute before he saw the tug (46), and when he saw the tug, it was only ten or twenty feet away from the ''Indianapolis'' (47), and he immediately reported the scow was in tow of the tug (47 and 48). The look-out first saw the tug when it was half past on the starboard bow (53). He heard the whistle of the tug one or two minutes before he saw the tug, but did not report it, thinking that the signal was heard as readily by the Master and the mate (53). The Master of the ''Indianapolis'' did not give the backing signal to the engine room until a minute after the stop signal (56-57). The tug

was seen by those on the "Indianapolis" to be on the starboard bow of the "Indianapolis" (41, 46, 54).

ARGUMENT.

The only contention on the part of the appellant is that the "Klickitat" was at fault as well as the "Indianapolis" in not obeying Article 16 of the International Collision Rules, which are the same as the Inland Rules, and is as follows:

> "SPEED OF SHIPS TO BE MODERATE IN FOG, AND SO FORTH.
>
> "ART. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."
>
> 26 Stat. at L. 326.
>
> 2 Fed. Stat. Annot. 160.

While the "Indianapolis" frankly admits her fault, it would seem that there is no virtue in such admission, as it is clearly shown that she was grossly at fault.

The Sagamore, 247 Fed. 743.

The Thielbek, 241 Fed. 209.

The "Indianapolis" was guilty of gross negli-

gence in reversing after giving the towing signal.

The Thielbek, 241 Fed. 216.

The tug with the tow was the privileged vessel and it was the duty of the "Indianapolis" to keep out of her way.

The Thielbek, 241 Fed. 209, at 215.

11 Corpus Juris, 1078.

The tug, being on the starboard bow of the "Indianapolis" and so appearing to those in charge of the navigation of the "Indianapolis," they were bound to keep out of the way of the tug in tow.

Article 19, International Rules:

> "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

26 Stat. at L. 327.

2 Fed. Stat. Annot. 162 and page 180 (Inland Rule same as International).

It was the duty of the tug and tow to keep her course and speed.

International Rule 21, 26 Stat. at L., page 327.

Inland Rule 21, 2 Fed. Stat. Annot, page 180.

Stress was laid, at the trial, upon the fact that the length of the tow-line was 300 feet, but the length of the tow-line is no ground for imputing blame to the tug.

The Jumna, 140 Fed. 743, at 747.

The learned trial judge felt that Rule 16 did not apply to the situation in which the tug found itself, upon the ground that the "circumstances of the

case'' did not admit of the ''Klickitat's'' stopping, and having the scow in tow overhaul her in mid-stream.

Going at a rate of speed hardly faster than a walk, less than four miles an hour, it cannot be said that the tug was proceeding at an immoderate rate of speed where she had a vision of 400 feet. After receiving a starboard passing signal, the tug would not be expected to have the ''Indianapolis'' make a port passing or such a passing as would endanger her tow.

The Master of the ''Indianapolis'' states that in foggy weather, it was his custom to back away from Colman Dock until the pierhead was out of sight, and that on this morning he backed about 120 feet (42). He proceeded to make a wide spring to the south, swinging to starboard and proceeding as far south as Pier D, five piers to the south of the Colman Dock, so that when he was on his course to pass outside the bell-buoy he was on a course crossing that of the ''Klickitat'' and that of her tow. It was certainly gross negligence for the ''Indianapolis,'' when the weather was so thick that the Master could only see 120 feet, to proceed at full speed across the course of vessels entering the harbor, and it is as clear as can be demonstrated, as found by the learned trial judge, that the collision was entirely and solely due to the gross negligence on the part of the ''Indianapolis'' and her Master and crew. In fact, the appellant admits that it was at fault, but seeks to hold the ''Klickitat'' for a division of dam-

ages because it did not technically comply with Rule 16 when the "circumstances of the case" would have brought on disaster if the "Klickitat" had stopped.

We, therefore, respectfully submit that the decree of the Honorable District Court for the Western District of Washington, Northern Division, should be, in all respects, affirmed.

H. H. A. HASTINGS,
LIVINGSTON B. STEDMAN,
Proctors for Appellees Canyon Lumber Company and Port Blakely Mill Company.

ROY L. CADWALLADER,
Proctor for Gus Smith and Cecelia Smith.

No. 3178

United States Circuit Court of Appeals

For the Ninth Circuit.

JESSE S. PHILLIPS, as Superintendent of Insurance of the State of New York, by MOSES JAMES WRIGHT, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation,

Plaintiff in Error,

vs.

JOHN C. LYNCH, as Receiver of the Pacific Coast Casualty Company, a Corporation, FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

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No. 3178

United States

Circuit Court of Appeals

For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

(No. 16,079.)

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants.

Complaint in Action to Recover Possession of Personal Property.

Now comes John C. Lynch, as receiver of the Pacific Coast Casualty Company, a corporation, as hereinafter more fully shown, and by leave of this Court, first had and obtained, files this his complaint against the defendant Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, and for cause of action alleges:

I.

That the defendant, Friend William Richardson, is the duly elected, qualified and acting Treasurer of the State of California, and the defendant Alexander McCabe is the duly appointed, qualified and acting Insurance Commissioner of the State of California.

II.

That on the 17th day of November, 1916, Daniel Combs filed in this court an action against the Pacific Coast Casualty Company, a bonding and casualty insurance corporation, created and existing under and by virtue of the laws of the State of California, for the purpose and with the object of having a receiver of said corporation appointed by this court and of having all of the property and assets of said corporation taken [1*] into the possession of this court, through its receiver thus to be appointed, and said property and assets applied to the payment of all the outstanding debts and liabilities of said corporation. Said action is sometimes hereinafter referred to as the "original action."

III.

That thereafter, to wit, on the 6th day of December, 1916, after due proceedings in that behalf had and obtained, in said "original action," this court duly gave, made and entered its order and decree appointing this plaintiff receiver of this court of all and singular the lands, tenements and hereditaments of the said Pacific Coast Casualty Company and of all personal assets thereof, of every kind, including all sum or sums of money due and payable or to become due and payable to it, and of all its office furniture, books of account and other personal property of every name, nature and description, and all of the stocks, bonds, and obligations, chose in ac-

*Page-number appearing at foot of page of original certified Transcript of Record.

tion, accounts and rights under contracts now owned or possessed by said corporation, together with all its corporate rights, franchises, incomes and profits of every description, in this district, to have and to hold the same as an officer of and under the orders and directions of this court, and this plaintiff as such receiver was by said order and decree thereby authorized and directed to take immediate possession of all and singular the property above described.

IV.

That said "original action" is No. 320, in equity, and the complaint therein and the order and decree appointing this plaintiff receiver, as hereinabove averred, are hereby referred to for a fuller and more detailed statement of the facts herein averred and, with the permission of this Court, said complaint, order and decree are made a part hereof.

V.

That plaintiff thereafter, to wit, on the 6th day of December, [2] 1916, duly qualified as such receiver, and ever since said day has been and now is the duly appointed, qualified and acting receiver of this court in said action as aforesaid.

VI.

That plaintiff is informed and believes and upon such information and belief alleges that for the purpose and with the object of obtaining for itself the right to do a casualty insurance business in states other than the State of California, and particularly in the State of New York, and in compliance with the laws of the State of New York requiring every insurance corporation created under the laws of a

state other than the State of New York, to keep on deposit with the Superintendent of Insurance of the State of New York, or with the auditor, comptroller or general fiscal officer under whose laws such corporation was formed, securities of the value of $250,000 for the benefit of all of the policy-holders of such corporation as a condition precedent to the granting of permission to such corporation to do a casualty insurance business in the State of New York, said Pacific Coast Casualty Company at some time prior to the filing of said complaint by said Combs in the "original action," delivered to the Insurance Commissioner of the State of California to be by him deposited with the Treasurer of the State of California for the security and benefit of all of the policy-holders of said company, certain securities consisting of bonds of an aggregate value of $250,000 and upwards.

VII.

That plaintiff is informed and believes and upon such information and belief alleges that the Insurance Commissioner of the State of California, upon the receipt by him of said securities forthwith made a special deposit of the same in the State Treasury in a package or packages marked with the name of said Pacific Coast Casualty Company, and that said securities, [3] together with certain interest coupons thereon, have ever since continued to be so deposited with and held by the Treasurer of the State of California.

VIII.

That said securities so delivered to said Insurance

Commissioner and by him deposited with said Treasurer of the State of California, as averred in the last foregoing paragraph, plaintiff is informed and therefore avers, consist of the following:

Description.		No.	Par Value (each).
15 City of Los Angeles	Water Works	30/37, 313/22	$1000
20 City of Los Angeles	Water Works	7919, 7922, 7925, 8139/63	1000
10 City of Oakland	Sewer	951/3–976/82	1000
10 City of Oakland	Park	288/97	1000
4 City of Oakland	Mun. Imp.	1713/16	1000
16 Town of Palo Alto	Mun. Imp.	25/40	1000
4 Town of Palo Alto	Mun. Imp.	37/40	875
1 Town of Palo Alto	Water	37	1000
2 Town of Palo Alto	Sewer	77, 78	500
2 City of Riverside	St. Imp.	69, 70	750
45 City & Co. of San Fr.	Fire & Sewer	2806/30, 4911/12, 3941/53	1000
18 City & Co. of San Fr.	Geary St. Ry.	1196/1200, 1204/6, 1301/10	1000
10 City of Stockton	Mun. Imp.	183, 186/8, 191/3, 196/8	1000
20 City of San Diego	Sewer Ext.	240/5, 253/9, 267/73	500
16 Town of Sebastopol	Mun. Imp.	70/1, 73/4, 76/7, 79/80	750
6 City of Tulare	Mun. Imp.	65/70	1000
11 City of Visalia	Mun. Imp.	104, 160/7, 109/10, 112/3, 115/6, 118/9	1000
25 San Joaquin Highway		1799, 1811, 1850/61	1000
10 Nor. Cal. Ry. of Cal.	1st Mtg.	522/26, 770/74	1000
15 Northern Ry. of Cal.		496/500, 1189/93, 1810, 3120, 3746/7, 4201	1000
7 Pacific Elc. Ry. Co.		51, 1714/15, 7992/5	1000
2 Southern Pacific Co.	1st Ref.	M–73049, M–73038	1000

Plaintiff asks that in case securities other than or in addition to those enumerated in this paragraph are now held on deposit by the said Treasurer of the State of California for the purposes and on the trusts in this complaint stated, such securities shall be subject to the judgment, orders, and decrees of [4] this court in this action in the same manner as the securities herein specifically described.

IX.

Plaintiff is informed and believes and upon such information and belief alleges that said securities so delivered to said Insurance Commissioner of the State of California and by him deposited with said Treasurer as hereinabove averred, were delivered to said Insurance Commissioner and by him deposited with said Treasurer and are now held by said Treasurer subject to disposition thereof for the benefit of all of the policy-holders of said corporation by such court as should acquire jurisdiction of the subject matter thereof, in the event that said corporation should cease business or become insolvent or should fail to pay liabilities which should accrue to policy-holders of said corporation as the same shall fall due.

X.

Plaintiff is informed and believes and on such information and belief alleges that on or about the 28th day of February, 1916, said Pacific Coast Casualty Company surrendered its permit to do business in the State of California, and since said last mentioned date has ceased to do business in the State of California or elsewhere and that since said date

said Pacific Coast Casualty Company has been in process of liquidation, as hereinbefore averred.

XI.

That plaintiff is advised and therefore avers that by reason of the facts hereinabove stated, this court has acquired and assumed jurisdiction of said securities deposited with the defendant as aforesaid, as well as all other property of said Pacific Coast Casualty Company within this district, including jurisdiction to determine and enforce the rights of policy-holders, creditors and others therein and thereto, and that plaintiff as the [5] officer and receiver of this court, and by virtue of the orders and directions of this court, as hereinabove averred, is entitled to the possession of said securities and to hold the same subject to such orders and decrees as to the disposition and application thereof, as the Court hereafter may make in said "original action."

XII.

That plaintiff, before the filing of this complaint, made demand upon said defendants and each thereof for the delivery to plaintiff as receiver as aforesaid of said securities, but defendants refused and neglected to have ever since refused and neglected to deliver the same or any part thereof unto plaintiff.

WHEREFORE, plaintiff demands judgment against the defendants for the delivery to him of all of the securities mentioned and referred to in this complaint, and for such other and further or different relief as may be meet in the premises.

Dated June 1st, 1917.

HIRAM W. JOHNSON, Jr.,
A. A. DE LIGNE,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

John C. Lynch, being first duly sworn, deposes and says:

That he is the duly appointed, qualified and acting receiver of the Pacific Coast Casualty Company, a corporation.

That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

JOHN C. LYNCH.

Subscribed and sworn to before me this 1st day of June, 1917.

[Seal] HORTENSE GARDNER,
Notary Public in and for the City and County of San Francisco, State of California. [6]

[Endorsed]: Filed Jun. 1, 1917. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [7]

(Title of Court and Cause.)

Answer of Alexander McCabe, as Insurance Commissioner of the State of California.

Comes now the defendant Alexander McCabe, as

Insurance Commissioner of the State of California, answering the complaint of plaintiff herein, and admits, denies, alleges and avers as follows, to wit:

I.

Answering the allegations contained in paragraphs VI, VII, VIII and IX of said complaint, this defendant alleges that he has no information or belief sufficient to enable him to answer certain of the matters and things therein contained, and basing his denial upon that ground denies that for the purpose and with the object, or for the purpose, or with the object, of obtaining for itself the right to do casualty insurance business, particularly in the State of New York, and in compliance, or in compliance, with the laws of the State of New York, requiring every or any insurance corporation created under the laws of the State, other than the State of New York, to keep on deposit with the Superintendent of Insurance of the State of New York, or with the Auditor, Comptroller, or General Fiscal Officer, securities of the value of $250,000, or any sum for the benefit of all or any of the policy-holders of such corporation, as a condition precedent to the granting of permission to such corporation to do a casualty insurance business in the State of New York, or elsewhere, or otherwise, or at all, said Pacific Coast Casualty Company at any time prior to the filing of the complaint in the action referred to in the complaint now being answered as the "Original action," or ever, or at all, delivered to the Insurance Commissioner, to be by him deposited with the Treasurer of the State of California, [8] for the security and benefit, or

security, or benefit, of all, or any, of the policy-holders of said company, certain, or any, securities, consisting of bonds of the aggregate value of $250,000 and upwards, or upwards, or any other sum, or at all, except as herein set out, and in this connection said defendant alleges:

That he is informed and believes, and upon such information and belief alleges that the predecessor, or predecessors, of this defendant in the office of the Insurance Commissioner of the State of California received from said Pacific Coast Casualty Company the securities set out in allegation VIII of said complaint, under the provisions of section 618 of the Pol. C. of the State of California, and not otherwise, on deposit and in trust for the policy-holders of such company, and that he did forthwith make a special deposit of the same in the State Treasury, in packages marked with the name of said company, where the same have since remained as security for policy-holders in said company.

II.

Answering allegation XI of said complaint, this defendant denies that said Court by reason of the facts set out in said complaint, or otherwise, has acquired and assumed, or acquired, or assumed, jurisdiction of said securities received by the predecessor in office of this defendant, or by him deposited in the State Treasury the jurisdiction to determine and enforce, or determine, or enforce, the rights of policy-holders, creditors and others, or policy-holders or creditors, or others, therein and thereto, or therein, or thereto, or that said plaintiff is entitled

to the possession of said securities and to hold, or to hold, the same subject to such orders and decrees, or orders, or decrees, as to the disposition and application, or disposition, or application, thereof, as the Court [9] may make in said action referred to in said complaint as "original action."

III.

And further answering said complaint, this defendant alleges that at various times, subsequent to the receipt by the predecessor of this defendant in office as Insurance Commissioner of the State of California, and prior to any demand upon this defendant by said plaintiff, as set out in allegation XII of said complaint, this defendant has received, and has served upon him, as Insurance Commissioner of the State of California, and J. E. Phelps, predecessor of this defendant in the office of Insurance Commissioner of the State of California has received and had served upon him, as such Commissioner, various writs of attachment, writs of execution, notices, demands, and stipulations, according to the following schedules, upon the dates, and by the persons, and in the amount set out in the schedule following:

Date of Service upon Insurance Commissioner.	Name of Claimant.	Amt.	Description of Demand.
November 3, 1916	Henry Weilenman	$2,936.90	Execution
November 3, 1916	Henry Weilenman	881.60	Execution
November 4, 1916	Sadie Ann Billings et al.	3,373.80	Execution
November 6, 1916	M. J. Mulvihill	2,500.00	Execution
September 26, 1916	Anna McPherson Joseph McPherson	307.70	Judgment
June 19, 1916	Clyde C. Struble	6,353.84	Writ of Attch.
June 23, 1916	Fidelity & Deposit Co. of Maryland	14,948.18	Writ of Attch.
November 16, 1916	Theodore Veyhle & Elmo Collins	4,600.00	Writ of Attch.
November 28, 1916	J. B. Jones	571.10	Execution

IV.

That it is necessary and proper to a full and complete determination of the issues of this action that the persons so [10] serving notices, writs and stipulations, upon this defendant, or his predecessor in the office of Insurance Commissioner of the State of California, be brought in as parties to this action, and that the process of this court be served upon them, so that they may appear, and have their respective claims and demands in and to said securities determined in this action; this defendant claiming no interest in, or to, the said securities as Insurance Commissioner, or otherwise, except that the same shall be delivered over to the person, or persons, entitled thereto.

That this defendant is informed and believes and basing his allegation upon that ground alleges that some, or all, of the persons named in the third allegation of this answer were or are policy-holders of the Pacific Coast Casualty Company, and persons for whom the deposit so made as aforesaid are held in trust, and as security for such policy-holders, and that there are other policy-holders of said company likewise interested in said deposit and not parties to said action, and that, therefore, it is not the right or duty of this defendant to release, or consent to the release, of said securities as prayed for in said complaint until the claims and rights of said persons shall have been adjudicated herein.

WHEREFORE, this defendant prays judgment

1st. That the persons named and referred to in the third allegation of this complaint, and any pol-

icy-holders of said company interested in said deposit, be brought in as parties to this action and required to set up their claims, if any they have, in and to the said deposit, or any part thereof, and that direction be given this defendant as to what action, if any, he shall take with reference to the writs, notices, demands, and stipulations herein and in the complaint in this action set out; and that no judgment be taken against him, and that he be hence dismissed.

And for such other and further relief as shall be just and equitable.

JOHN W. STETSON,
Atty. for Insurance Commissioner. **[11]**

Service of the within answer admitted by copy this 28th day of June, 1917.

HIRAM W. JOHNSON, Jr., and
A. A. DE LIGNE,
Attorneys for Plaintiff.

[Endorsed]: Filed June 28, 1917. Walter B. Maling, Clerk. **[12]**

(Title of Court and Cause.)

Notice of Motion for Permission to Intervene.

To the Plaintiff JOHN C. LYNCH, as Receiver of the Pacific Coast Casualty Company, a Corporation, and to Messrs. Hiram W. Johnson, Jr., and A. A. De Ligne, His Attorneys; and to FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and to Hon. U. S.

Webb, Attorney General of the State of California, and Hon. John T. Nourse, Deputy Attorney General, His Attorneys; and to ALEXANDER McCABE, as Insurance Commissioner of the State of California, and to John W. Stetson, Esq., His Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, will on Monday, the 15th day of October, A. D. 1917, at the hour of ten o'clock A. M. of said day at the courtroom of the above-entitled court in the United States Postoffice and courthouse building at Seventh and Mission Streets, in the City and County of San Francisco, said Northern District of California, move the said Court for an order permitting him, the said Jesse S. Phillips, as such Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance to file a complaint in intervention herein against the said plaintiff and the said defendants and other parties as more fully appears from a copy of said proposed complaint in intervention hereto annexed and served and filed herewith.

Said motion will be based upon this notice of motion said verified complaint in intervention, and upon all the pleadings, papers, and records on file herein, and will be made upon [13] the ground that the said intervener has an interest in the matter

in litigation herein against both plaintiff and defendants, and asserts and makes demands adversely to both the plaintiff and the defendants, and that a complete determination of the controversy cannot be had without the presence of the intervenor, and the other parties named as defendants in intervention herein.

HARTLEY F. PEART,

Attorney for Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation.

[14]

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,079.

JOHN C. LYNCH, as Receiver of the Pacific Coast Casualty Company, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants.

JESSE S. PHILLIPS, as Superintendent of Insurance of the State of New York, by MOSES JAMES WRIGHT, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation,

Plaintiff in Intervention,

vs.

JOHN C. LYNCH, as Receiver of the Pacific Casualty Company, a Corporation, FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, ALEXANDER McCABE, as Insurance Commissioner of the State of California, WILLIAM GOW, M. J. MULVIHILL, EUGENE SCHULER, THEODORE VEYHLE and ELMO COLLINS, Copartners Doing Business Under the Firm Name and Style of VEYHLE & COLLINS, SADIE ANN BILLINGS, CYLDE C. STUBLE, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, LOS ANGELES ROCK & GRAVEL CO., a Corporation, NATIONAL UNION FIRE INSURANCE CO., a Corporation, HENRY WEILEMAN, ANNA McPHERSON, JOHN DOE, JANE DOE, JAMES BLACK, RICHARD ROE, and GEORGE GREEN,

Defendants in Intervention.

Complaint in Intervention.

Now comes Jesse S. Phillips, as Superintendent of Insurance of the State of New York, of the United

States of America, by Moses James Wright, Special Deputy Superintendent of Insurance, and agent and liquidator of said Superintendent of Insurance of the Casualty Company of America, a corporation, and by leave of this Court first had and obtained, files this his complaint in intervention against the plaintiff John C. Lynch, as receiver of the Pacific Coast Casualty Company, a corporation, and the defendants [15] Friend William Richardson, as Treasurer of the State of California, Alexander McCabe, as Insurance Commissioner of the State of California, William Gow, M. J. Mulvihill, Eugene Schuler, Theodore Veyhle and Elmo Collins, copartners doing business under the firm name and style of Veyhle & Collins, Sadie Ann Billings, Clyde C. Stuble, Fidelity and Deposit Company of Maryland, a corporation, Los Angeles Rock & Gravel Co., a corporation, National Fire Insurance Co., a corporation, Henry Weileman, Anna McPherson, John Doe, Jane Doe, James Black, Richard Roe, and George Green, defendants in intervention, and for cause of action against said defendants in intervention, alleges:

I.

That this plaintiff in intervention is, and at all the times herein mentioned was, the duly appointed, qualified, and acting Superintendent of Insurance of the State of New York, of the United States of America, and that said Moses James Wright is, and at all times herein mentioned was, the duly appointed, qualified, and acting Special Deputy Superintendent of Insurance of the State of New York, and that said Jesse S. Phillips, as such Superintend-

ent did, on the 4th day of May, 1917, duly appoint said Moses James Wright, as such Special Deputy Superintendent of Insurance, his agent to liquidate the business of the Casualty Company of America, a corporation, as provided by Section 63 of the Insurance Law of the State of New York, and that said Moses James Wright ever since has been and now is, such agent and liquidator of said Casualty Company of America.

II.

That said Casualty Company of America is and at all the times herein mentioned up to the 4th day of May, 1917, was an insurance corporation organized, created, and existing under and by virtue of the laws of the State of New York, and transacting various kinds of insurance business hereinafter particularly specified in the State of New York and in other States of the [16] United States; and that on the 4th day of May, 1917, upon proceeding duly taken and had by this plaintiff in intervention, the Supreme Court of the State of New York, Part One thereof, at the special term held at the county courthouse in the Borough of Manhattan, city of New York, duly gave, made, and entered its order directing this plaintiff in intervention to take possession of the property and liquidate the business of the said Casualty Company of America, under and pursuant to Section 63 of the Insurance Law of the State of New York, and investing this plaintiff in intervention with title to all the property, contracts, and rights of action of said company, and directing him to deal with the same in his own name as Superin-

tendent of Insurance, and that said order has ever since been, and now is in full force and effect; that this plaintiff in intervention, through his said Special Deputy Superintendent of Insurance and agent as above set forth, did thereupon and on said 4th day of May, 1917, take possession of the property, and proceed to liquidate the business, and is now liquidating the business of the said Casualty Company of America.

III.

That the defendant in intervention Alexander McCabe is the duly appointed, qualified and acting Insurance Commissioner of the State of California, and that the defendant in intervention Friend William Richardson is the duly elected, qualified, and acting Treasurer of the State of California.

IV.

That the defendant in intervention John C. Lynch is the duly appointed, qualified, and acting Receiver of the Pacific Coast Casualty Company, a corporation.

V.

That the defendant in intervention Fidelity and Deposit Company of Maryland is, and at all the times herein mentioned was, [17] a corporation organized, created, and existing under and by virtue of the laws of the State of Maryland; that the defendant in intervention Los Angeles Rock & Gravel Co. is and at all the times herein mentioned was, a corporation organized, created and existing under and by virtue of the laws of the State of California; that the defendant in intervention National Union Fire In-

surance Co. is and at all the times herein mentioned was a corporation created and existing under and by virtue of the laws of one of the states of the United States other than California, the particular state not being known to the plaintiff in intervention, who prays that when this is discovered that this and all other pleadings may be amended accordingly.

VI.

That the defendants in intervention Theodore Veyhle and Elmo Collins are and at all the times herein mentioned were copartners doing business under the firm name and style of Vehyle & Collins; and that said defendants in intervention are, according to the information and belief of this plaintiff in intervention, and he so alleges, citiezns of the United States and residents of the State of California.

VII.

That the defendants in intervention M. J. Mulvihill, Eugene Schuler, Sadie Ann Billings, Clyde C. Stuble, Henry Weileman, and Anna McPherson are, according to the information and belief of this plaintiff in intervention, and he so alleges, citizens of the United States and residents of the State of California; that the defendant in intervention William Gow is, according to the information and belief of this plaintiff in intervention, and he so alleges, a citizen of the United States and a resident of the State of New York; that the defendants in intervention John Doe, Jane Doe, James Black, Richard Roe, and George Green are, according to the information and belief of this plaintiff in intervention, and he so al-

leges, citizens of the [18] United States, but this plaintiff in intervention has no information or belief as to where each of said last-named defendants in intervention are resident, and this plaintiff in intervention is ignorant of the true names of said defendants in intervention John Doe, Jane Doe, James Black, Richard Roe, and George Green, and hence brings this action against them under said fictitious names, and prays that when their residences and their true names be discovered that this and all other pleadings may be amended accordingly.

That plaintiff in intervention is informed and believes and according to such information and belief alleges that said defendants in intervention William Gow, M. J. Mulvihill, Eugene Schuler, Theodore Veyhle and Elmo Collins, copartners doing business under the firm name and style of Veyhle & Collins, Sadie Ann Billings, Clyde C. Stuble, Fidelity and Deposit Company of Maryland, a corporation, Los Angeles Rock & Gravel Co., a corporation, National Union Fire Insurance Co., a corporation, Henry W*rile*man, Anna McPherson, John Doe, Jane Doe, James Black, Richard Roe, and George Green, have each caused writs of attachment or garnishment to be issued out of the Superior Court of the State of California, and have served and levied the same upon the defendant in intervention Friend William Richardson as Treasurer of the State of California and as against the said securities hereinafter particularly described.

VIII.

That on and for a long time prior to the 28th day

of February, 1916, said Pacific Coast Casualty Company, was an insurance company, organized, created, and existing under and by virtue of the laws of the State of California, and holding a permit to do business within the State of California in Surety, Workman's Compensation, Liability, Fidelity, Burglary, and other lines of insurance and elsewhere in the United States of America; [19] that prior to the 28th day of February, 1916, and on or prior to the month of August, 1910, according to the information and belief of this plaintiff in intervention, and he so alleges, said Pacific Coast Casualty Company, for the purpose and object of obtaining a license to do certain lines of insurance business in the State of New York, and pursuant to the Insurance Law of the State of New York, delivered to the Insurance Commissioner of the State of California, to be by him deposited with the Treasurer of the State of California, certain securities of the value of $250,000 and upwards, hereinafter particularly described, and that said securities, upon receipt thereof by said Insurance Commissioner, were by him specially deposited with the Treasurer of the State of California, in a package or packages, marked with the name of said company, and that said securities, together with the interest coupons thereon, have ever since continued to be, and now are deposited with and held by the Treasurer of the State of California.

That said securities so delivered to the Interstate Commissioner of the State of California, and by him deposited with said Treasurer of the State of California, and now held by said Treasurer according to

the information and belief of your plaintiff, and he so alleges, consist of the following:

	Description.			No.	Par Value (Each).
15	City of Los Angeles	Water Works	Bonds	30/37, 313/22	$1000
20	City of Los Angeles	Water Works	Bonds	7919, 7922, 7925, 8139/63	1000
10	City of Oakland	Sewer	Bonds	951/3, 976/82	1000
10	City of Oakland	Park	Bonds	288/97	1000
4	City of Oakland	Mun. Imp.	Bonds	1713/16	1000
16	Town of Palo Alto	Mun. Imp.	Bonds	25/40	1000
4	Town of Palo Alto	Mun. Imp.	Bonds	37/40	875
1	Town of Palo Alto	Water	Bonds	37	1000
2	Town of Palo Alto	Sewer	Bonds	77, 78	500
2	City of Riverside	St. Imp.	Bonds	69, 70	750
45	City & Co. of San Francisco [20]	Fire & Sewer	Bonds	2806/30, 4911/12, 3941/53	1000
18	City & Co. of San Fr.	Geary St. Ry.	Bonds	1196/1200, 1204/6, 1301/10	1000
10	City of Stockton	Mun. Imp.	Bonds	183, 186/8, 191/3, 196/8	1000
20	City of San Diego	Sewer Ext.	Bonds	240/5, 253/9, 267/73	500
16	Town of Sebastopol	Mun. Imp.	Bonds	70/1, 73/4, 76/7, 79/80	750
6	City of Tulare	Mun. Imp.	Bonds	65/70	1000
11	City of Visalia	Mun. Imp.	Bonds	104, 160/7, 109/10, 112/3, 115/6, 118/9	1000
25	San Joaquin Highway		Bonds	1799, 1811, 1850/81	1000
10	Nor. Cal. Ry. of Cal.	1st Mtg.	Bonds	522/26, 770/74	1000
15	Northern Ry. of Cal.			496/500, 1189/93, 1810, 3120, 3746/7, 4201	1000
7	Pacific Elc. Ry. Co.		Bonds	51, 1714/15, 7992/5	1000
2	Southern Pacific Co.	1st Ref.	Bonds	M-73049, M-73038	1000

That said securities are the securities mentioned and referred to in paragraph VI of plaintiff's complaint on file herein.

IX.

That at the city of New York, State of New York, on or about the 25th day of February, 1916, and duly authorized so to do by written consent of more than two-thirds of its stockholders, said Pacific Coast Casualty Company, made and entered into an agreement to and with said Casualty Company of America, in words and figures as follows, to wit:

"THIS REINSURANCE AGREEMENT, Made and entered into by and between the CASUALTY COMPANY OF AMERICA, of New York, New York, (hereinafter referred to as 'Casualty') a corporation organized, and existing under and by virtue of the Insurance Laws of the State of New York, and authorized by its charger to transact each and all of the several classes of Insurance business contemplated by this agreement, in the States of New York and California, and elsewhere in the United States, party of the one part, and the Pacific Coast Casualty Company, of California, of San Francisco, California (hereinafter referred to as 'Pacific') a corporation organized and existing under the Insurance Laws of the State of California, and authorized by its charger to transact each and all of **[21]** the several classes of Insurance business contemplated by this agreement, in the State of California, and elsewhere in the United States, party of the other part,

WITNESSETH:

1. The 'Pacific' hereby agrees and binds itself to reinsure with the 'Casualty' on and as of the twenty-eighth day of February, 1916, its liability under each

and all of its own unexpired policies of insurance, subject in all respect to the terms, conditions and stipulations hereinafter more fully recited.

2. The 'Casualty' hereby agrees and binds itself to accept and carry for the 'Pacific' the liability so reinsured by it, subject in all respects to the terms, conditions and stipulations hereinafter more fully recited.

3. The business contemplated includes the entire outstanding liability of the 'Pacific' arising after twelve o'clock noon on the twenty-eighth day of February, 1916, under its own policies and renewals, covering risks situated in the State of California and elsewhere in the United States, and embraces the following, so-called, classes of Insurance risks, to wit: Accident and/or Health, Automobile Theft and Automobile Liability or Property Damage or Automobile Collision, Burglary and/or Theft, Fidelity, Employers' and/or Public Liability, Plate Glass, Surety, Workmen's Collective, Workmen's Compensation, and such other classes upon which the 'Pacific' has assumed and is carrying an Insurance liability as the 'Casualty' may and can properly reinsure, but no other.

4. The outstanding liability of the 'Pacific' under all of its said policies and renewals shall be assumed by the 'Casualty' on and as of Twelve o'clock noon of the twenty-eighth day of February, 1916, and the 'Pacific' shall be held harmless and duly protected against any and all claim [22] or loss arising under and by reason of, its policy liabilities; provided the occurrence upon which such claim or loss

is predicated shall have had its inception, and taken place subsequent to twelve o'clock noon of the twenty-eighth day of February, 1916.

5. The 'Pacific' shall furnish, in so far as it is advised, complete data relating to each and every risk to be assumed by the 'Casualty' and shall deliver to the 'Casualty' all applications, reports, inspections, correspondence, agents' contracts and other information of whatever kind or description which it may have acquired with respect to the several risks reinsured. Schedules of the 'Pacific's' policies and renewals in force, and which are subject to the terms and conditions of this agreement, shall be prepared by the 'Pacific' and furnished to the 'Casualty' within thirty days following the date of execution hereof, and these schedules shall be rendered for each class of business separately, and shall be so prepared as to show the essential features of each risk, i. e., Policy number, Renewal number, Date of Commencement, Term, Name of Assured, Beneficiary (if any), Character of risk, Location of risk, Amount of Insurance, Rate, Original Premium, Name and Residence of Agent, Unearned Premium figured from date upon which liability is assumed by the 'Casualty' (i. e., the twenty-eighth day of February, 1916) to the next following date of expiration of the respective policy or renewal, calculated upon the pro rata basis, i. e., such portion of the original premium as the unexpired part of the policy or renewal bears to the full term of such respective policy or renewal.

6. The aggregate amount of the unearned prem-

iums calculated in the manner provided in Paragraph #5 hereof shall, for the purposes of this agreement, be held to be the premium [23] reserved (or so-called reinsurance reserves), and the 'Casualty' shall, within thirty days next following receipt by it of all such schedules, examine and audit the data, and if found to be correct shall confirm same to the 'Pacific,' but if found to be incorrect, shall furnish to the 'Pacific' full account of all such errors, and the correct balance of the premium reserves thus ascertained shall constitute the gross amount (i. e., premiums without reduction by commission or otherwise) of the 'Premium Reserves' hereinafter referred to.

7. In consideration of the assumption by the 'Casualty' of the 'Pacific's' future liability under its outstanding policies and renewals as hereinabove provided, the 'Pacific' shall pay to the 'Casualty' in cash or securities acceptable to the 'Casualty' an amount equal to the 'Premium Reserves' less certain final percentages of such 'Premium Reserves' applying and growing out of the respective classes of business reinsured by the 'Casualty' as follows:

The 'Premium Reserves' covering the business of the several classes of Insurance shall be reduced by the following percentages, to wit:

(a) Accident and/or Health business.....35%
(b) Automobile Liability, Automobile Theft and/or Property Damage and Collision business 25%
(c) Burglary and/or Theft business.....35%
(d) Fidelity business 30%

(e) Employers' and 17½ or Public Liability business 25%
(f) Plate Glass business 35%
(g) Surety business 30%
(h) Workmen's Collective business 17½%
(i) Workmen's Compensation business....17½%

and if additional classes of business are to be reinsured hereunder, the percentage allowance of reduction of the 'Premium Reserves' applying to the business of such additional classes shall be determined by mutual agreement. The net amount thus found to be due to the 'Casualty' shall be [24] paid by the 'Pacific,' as above stipulated, on receipt of written notice from the 'Casualty' of the amount due.

8. The 'Casualty' shall not be or become liable under any of the 'Pacific's' policies or renewals which have not been included in the schedules of outstanding business hereinbefore provided for.

9. The 'Pacific' shall discontinue and shall not re-engage in the transaction of the direct insurance business, in any of the classes of insurance contemplated hereunder, for a period of five (5) years at any place in the United States.

10. Upon receipt of full and complete information from the 'Pacific' of all unpaid premiums upon any and all policies and renewals reinsured hereunder, the 'Casualty' shall endeavor to collect such unpaid premiums by such processes as it observes in the transaction of its own direct business, and shall render to the 'Pacific' an account of all such premiums so collected monthly, and shall within

fifteen days next following the close of each calendar month hereafter remit to the 'Pacific' the net amount realized during the preceding calendar month, after having deducted agent's commission on the respective items collected, and expense cost incident to and growing out of the 'Casualty's' efforts in this respect.

11. In the event of the parties hereto being unable to agree on any questions which may arise hereunder, such questions shall be settled by arbitration; Edward L. Hearn to represent the 'Casualty' and T. L. Mill or F. B. Lloyd to represent the 'Pacific.' Should the two so selected be unable to agree, they shall select a third, decision shall be final.

12. This agreement in all particulars and in its entirety is subject to the approval and ratification of the Board of [25] Directors or Executive Committees of the respective parties at interest hereto, of which action prompt notice shall be given in writing, accompanied by a certified copy of such respective resolution, by each party to the other. This agreement is also subject to the approval of the State Insurance Department of the State of New York.

THIS AGREEMENT executed in duplicate shall take effect on the 28th day of February, 1916.

Signed in the City of New York, State of New York, this 25th day of February, 1916.

CASUALTY COMPANY OF AMERICA.

(Signed) By EDWARD L. HEARN,

President.

Attest: JOHN D. JENKINS,
Secretary.

PACIFIC COAST CASUALTY COMPANY OF CALIFORNIA.
By F. B. LLOYD,
Attorney in Fact.

Attest: DANIEL COOMBS.

State of New York,
County of New York,—ss.

On this 25th day of February, 1916, before me personally appeared Edward L. Hearn, President of the Casualty Company of America, to me known and known to me to be the person who executed the foregoing instrument, and who being duly sworn deposes and says, that he knew the seal of said corporation and that the seal affixed is the seal of the Casualty Company of America, and that said seal was attached by resolution of the Board of Directors of said corporation, and that he signed said instrument by like order, and at the same time also personally appeared J. B. Lloyd, attorney in fact of the Pacific Coast Casualty Company, to me known to be the person who executed the foregoing instrument, and who being duly sworn deposes and says that he signed said instrument on behalf of the Pacific Coast Casualty Company by [26] virtue of resolution of the Board of Directors of said Company.

Sworn to before me this 25th day of February, 1916.

(Signed) MARY I. CAMPBELL, (Seal)
Notary Public Kings County No. 257, Register's No. 7103. Certificate filed in N. Y. County, No. 295 Register's No. 7243."

That said agreement was ratified and approved by the Board of Directors of said Pacific Coast Casualty Company and by the Board of Directors of said Casualty Company of America, and by the said Insurance Department of the State of New York. Said agreement will be hereinafter referred to as the "Reinsurance Agreement."

X.

That at the city of New York, State of New York, and on or about the 25th day of February, 1916, and duly authorized so to do by writen consent of more than two-thirds of its stockholders, said Pacific Coast Casualty Company, made and entered into a further agreement to and with said Casualty Company of America, in words and figures as follows, to wit:

"THIS AGREEMENT Made and entered into by and between the Casualty Company of America, of New York, New York (hereinafter referred to as 'Casualty') a corporation organized and existing under and by virtue of the Insurance Laws of the State of New York, and authorized by its charter to transact each and all of the several classes of insurance business contemplated by this agreement, in the States of New York and California, and elsewhere in the United States, party of the one part, and the Pacific Coast Casualty Company, of California, of San Francisco, California, (hereinafter referred to as 'Pacific') a corporation organized and existing under the Insurance Laws of the State of California, and [27] authorized by its charter to transact each and all of the several classes of insur-

ance business contemplated by this agreement, in the State of California, and elsewhere in the United States, party of the other part.

WHEREAS, the 'Pacific' desires to arrange for the further handling, investigation, adjustment, settlement and/or payment of all outstanding claims and losses proceeding from its policies of insurance heretofore issued, and which claims and losses have had their inception in an event occurring prior to 12 o'clock noon, of the twenty-eighth day of February 1916 (the day and hour from which it has reinsured in the 'Casualty' its further outstanding policy liabilities under another engagement running contemporaneously hereto) and to relieve itself of the care and attention incident thereto; and

WHEREAS, the 'Casualty' is prepared to undertake the further handling, investigation, adjustment, settlement and/or payment of such claims and losses subject in all respects to the terms, conditions, and stipulations hereinafter more fully provided.

Now, therefore, this agreement WITNESSETH:

1. The 'Pacific' agrees and binds itself (a) to transfer, assign, and set over to the 'Casualty' in cash or securities acceptable to the 'Casualty,' an amount equal and corresponding to the aggregate amount of the 'Pacific' legal loss reserves of December 31st, 1915, and (b) provided the amount so transferred, as above stipulated, shall ultimately prove to be less than the aggregate amount disbursed by the 'Casualty' in settlement of the losses, liability, costs and expense growing out of such claims and losses, to indemnify the 'Casualty' upon its demand

for any sum so disbursed by it which is in excess of the amount transferred to the 'Casualty' in accordance with this Paragraph #1, and (c) to hold as collateral all of its Capitol and Surplus free of charge [28] without the written consent of Edward L. Hearn, President of the 'Casualty,' subject to the demand of the 'Casualty,' in this respect; provided, however, that if all such outstanding claims and losses have not been adjusted and disposed of by the first of January, 1917, then and in that event each of the parties hereto shall appoint a representative to estimate the reserve necessary to satisfy such of said outstanding claims as may at that time remain unsettled, and the 'Pacific' shall have the right to receive and dispose of, as it may see fit, such part of said loss reserve and Capitol and Surplus as above provided which it has turned over or placed in trust to protect the party of the first part against such outstanding claims as may exceed the estimate of such reserve required to meet such outstanding claims as may be made by said representatives; and in the event said representatives are unable to agree as to the amount of such reserve, they shall appoint a third party whose decision shall be binding.

2. All interest or dividends accruing from the securities transferred to the 'Casualty' by the 'Pacific' on account of the loss reserves, shall be credited to the loss reserves by the 'Casualty' at once on receipt of payment thereof.

3. The 'Casualty' agrees (a) to proceed with the handling, investigation, adjustment, settlement and/or payment of such claims and losses, and to ex-

pedite their final disposition with all possible haste consistent with the best interest of the 'Pacific,' and subject at all times to the supervision of F. B. Lloyd or such other person as the 'Pacific' may designate and (b) provided all such claims and losses are adjusted and finally disposed of at an aggregate amount covering all loss payments, legal expense and court costs incident to and growing out of such claims and losses less than the amount of loss reserves which have been paid over to it under and in accordance [29] with Paragraph #1 and #2 hereof, then and in that event to refund to the 'Pacific' so much of the said loss reserves as may be in excess of the aggregate amount so disbursed by the 'Casualty.'

4. All of the shares of the Capital Stock of the 'Casualty' which may be purchased by the 'Pacific' shall be deposited with the Columbia Trust Company of New York, New York, under a trust agreement to be held by it as collateral to protect the 'Casualty' in the event the amount transferred to the 'Casualty' by the 'Pacific' covering the loss reserves shall prove to be less than the aggregate amount disbursed by the 'Casualty' in payment of losses, costs and expense incident to and growing out of the outstanding claims and losses.

5. In the event of the parties hereto being unable to agree on any questions which may arise hereunder, such questions shall be settled, by arbitration; Edward L. Hearn to represent the 'Casualty' and T. L. Miller or F. B. Lloyd to represent the 'Pacific.' Should the two so selected be unable to

agree, they shall select a third person, whose decision shall be final.

6. This agreement in all particulars and in its entirety is subject to the approval and ratification of the Board of Directors of Executive Committee of the respective parties at interest hereto, of which action prompt notice shall be given in writing, accompanied by a certified copy of such respective resolution, by each party to the other. This agreement is also subject to the approval of State Insurance Department of the State of New York.

This agreement, executed in duplicate, shall take effect on the twenty-eighth day of February, 1916.

Signed, in the City of New York, State of New York, this [30] twenty-fifth day of February, 1916.

CASUALTY COMPANY OF AMERICA.
By EDWARD L. HEARN,
President.

(Seal) Attest: JOHN S. JENKINS,
Secretary.

PACIFIC COAST CASUALTY COMPANY OF CALIFORNIA.
By F. B. LLOYD,
Attorney in Fact.

Attest: DANIEL COMBS.

State of New York,
County of New York,—ss.

On this 25th day of February, 1916, before me personally appeared Edward L. Hearn, President of the Casualty Company of America, to me known and known to me to be the person who executed the

foregoing instrument, and who being duly sworn deposes and says, that he knew the seal of the said corporation and that the seal affixed is the seal of the Casualty Company of America, and that said seal was attached by resolution of the Board of Directors of said corporation, and that he signed said instrument by like order, and at the same time also personally appeared F. B. Lloyd, attorney in fact of the Pacific Coast Casualty Company to me known to be the person who executed the foregoing instrument, and who being duly sworn, deposes and says that he signed said statement on behalf of the Pacific Coast Casualty Co. by virtue of resolution of the Board of Directors of said company.

Sworn to before me this 25th day of February, 1916.

(Seal) MARY I. CAMPBELL,

Notary Public, Kings County No. 257, Register's No. 7103. Certificate filed in N. Y. County No. 295 Register's No. 7243." [31]

That said agreement was ratified and approved by the Board of Directors of said Pacific Coast Casualty Company, and by the Board of Directors of said Casualty Company of America, and by the said Insurance Department of the State of New York. Said agreement will be hereinafter referred to as the "Agency Agreement."

XI.

That on said 28th day of February, 1916, said Pacific Coast Casualty Company had issued and outstanding a great number of policies and renewals thereof of the various lines of insurance described

in paragraph 7 of said "Reinsurance Agreement," and which outstanding liabilities of the Pacific Coast Casualty Company were agreed to be assumed by the Casualty Company of America, pursuant to the terms of said agreement, and that pursuant to the terms of said "Reinsurance agreement" said Pacific Coast Casualty Company became indebted to said Casualty Company of America, on said 28th day of February, 1916, in the sum of $67,895.83; and that said sum of $67,895.83 was and is the net amount of unearned premiums or premium reserves audited and confirmed as correct between the two companies, and was the consideration due from the Pacific Coast Casualty Company to the Casualty Company of America for the agreement upon the part of the Casualty Company of America to assume the future liability of the Pacific Coast Casualty Company upon its then outstanding policies and renewals as in said agreement specified; that no part of said sum of $67,895.83 has ever been paid to the Casualty Company of America or to this plaintiff in intervention by the Pacific Coast Casualty Company, or anyone in its behalf, either in cash or in securities acceptable to the Casualty Company of America, except as hereinafter expressly set forth, and that the whole thereof, to wit: the said sum of $67,895.83, remains and is now wholly due, owing and unpaid. [32]

XII.

That pursuant to the terms and provisions of said "Reinsurance Agreement," and upon the policies and renewals thereof, so reinsured by said Casualty

Company of America, the said Casualty Company of America has paid policy and renewal obligations by losses, settlements, and adjustments, each and all of which are valid and existing obligations of the Pacific Coast Casualty Company, so reinsured by it, sums aggregating a sum in excess of $70,000; that there now exist and are pending many unsettled and unpaid claims and obligations of said Pacific Coast Casualty Company arising out of said policies and renewals so reinsured by said Casualty Company of America, the payment and settlement of which is demanded by the holders thereof from this plaintiff in intervention, and which claims and obligations aggregate sums greatly in excess of said sum of $70,000; that in the performance of said reinsurance agreement and the terms and conditions thereof upon its part to be performed said Casualty Company of America expended further large sums of money for necessary office space, clerical hire and expert adjusters, physicians and attorneys continuously from and after said 28th day of February, 1916, and up to the said 4th day of May, 1917, in the handling, investigation, adjustment, payment and settlement of claims and obligations so asserted and made against it upon said policies and renewals thereof so reinsured by it.

XIII.

That subsequent to the 28th day of February, 1916, the Casualty Company of America, endeavored to collect, and prior to December, 1916, did collect, unpaid premiums upon the policies and renewals reinsured under the terms of said "Reinsurance Agreement,"

and duly rendered to the Pacific Coast Casualty Company an account thereof monthly, and collected in all about the sum of $40,000 and at the direction and upon the authorization of the Pacific Coast Casualty Company, applied said sum [33] of $40,000, and the whole thereof, to the account of the Pacific Coast Casualty Company, and in settlement of its obligations under the terms of the said "Agency Agreement" as hereinafter particularly set forth.

XIV.

That the Casualty Company of America, from the time of the execution of the said "Reinsurance Agreement" and up to the said 4th day of May, 1917, duly carried out and performed each and all of the terms and conditions of the said "Reinsurance Agreement" upon its part to be performed.

XV.

That under and pursuant to the terms of said "Agency Agreement" and subsequent to the 28th day of February, 1916, the Casualty Company of America duly undertook the further handling, investigation, adjustment, settlement, and payment of all said outstanding claims and losses proceeding from the policies of insurance theretofore issued by said Pacific Coast Casualty Co., and which claims and losses had their inception in an event occurring prior to twelve o'clock noon of the 28th day of February, 1916, and that there were on and after said 28th day of February, 1916, a great many outstanding claims and losses requiring proper and skillful handling and investigation, adjustment, and settlement, continuously from and after said 28th day of February,

1917, by and on the part of the said Casualty Company of America, and the expenditure of large sums of money for necessary office space, clerical hire, and the services of expert adjusters, physicians, and attorneys continuously from and after said day and date last mentioned in the handling, investigation, adjustment, payment and settlement of such outstanding claims and losses, and that the said services were thereafter continuously rendered by the said Casualty Company of America to the said Pacific Coast Casualty Company for said purposes up to the said 4th day of May, 1917, [34] and that this plaintiff in intervention still has many unsettled claims, adjustments, and investigations pending in his hands.

That under and pursuant to the terms of said "Agency Agreement" said Pacific Coast Casualty Company agreed to transfer, assign, and set over unto the Casualty Company of America in cash and securities acceptable to the Casualty Company of America an amount equal to the amount of the legal loss reserves of the Pacific Coast Casualty Company as of December 31, 1915; that the amount of the legal loss reserves of said corporation as of said date exceeded the sum of $250,000; that subsequent to the execution of said "Agency Agreement" said Pacific Coast Casualty Company authorized and directed said Casualty Company of America to apply premiums that might be collected by the said Casualty Company of America under the terms of said "Reinsurance Agreement" and any other premiums

which might be collected by it, to its account under the terms of said "Agency Agreement" and that said Casualty Company of America did, as hereinbefore and hereinafter alleged, so collect and apply premiums in about the sum of $40,000; that said Pacific Coast Casualty Company did subsequent to the execution of said agreement, and prior to the 30th day of June, 1916, turn over to the said Casualty Company cash and securities in the further sum of $47,506.90.

XVI.

That under and pursuant to the terms of said "Agency Agreement," and subsequent to the 28th day of February, 1916, the Casualty Company of America in the said further handling, investigation, adjustment, settlement and payment of said claims and losses, and subject to the supervision and approval of a representative of the Pacific Coast Casualty Company, did expend for and on behalf of the Pacific Coast Casualty Company in payment, adjustment, and settlement of valid claims against said Pacific Coast Casualty Company, the total sum of about $206,948.25. As hereinabove alleged, the Casualty Company of America received [35] for the account of the Pacific Coast Casualty Company, from collections of premiums under said "Reinsurance Agreement" and other sources the total sum of $135,805.06, and at the direction of the Pacific Coast Casualty Company, applied said sum of $135,805.06 to the partial repayment of said sum of $206,948.25, leaving an agreed balance due to the Casualty Company of America, for expenditures so made on be-

half of said Pacific Coast Casualty Company, under said "Agency Agreement" of $71,143.19; that no part of said sum of $71,143.19 has ever been paid to the Casualty Company of America or to this plaintiff in intervention in its behalf by the Pacific Coast Casualty Company, or any one in its behalf, either in cash or in securities acceptable to the Casualty Company of America, except as hereinafter expressly set forth, and the whole balance of said sum, to wit: the sum of $71,143.19, remains and is now wholly due, owing, and unpaid; that in addition to said sum of $71,143.19 this plaintiff in intervention still has in his hands a large number of unsettled and pending claims and losses, and that additional sums, the exact amount of which plaintiff in intervention is unable to state, are due to plaintiff in intervention under the terms and conditions of said "Agency Agreement."

XVII.

That the Casualty Company of America, from the time of the execution of said "Agency Agreement," and up to said 4th day of May, 1917, duly carried out and performed each and all of the terms and conditions of the said "Agency Agreement" upon its part to be performed.

XVIII.

That as hereinabove set forth, there became due and owing to the Casualty Company of America from the Pacific Coast Casualty Company, under the terms of said "Reinsurance Agreement" on said 28th day of February, 1916, said sum of $67,895.83, being [36] the net amount of unearned premiums or

premium reserves of said insurance so reinsured, and there became due and owing to the Casualty Company of America from the Pacific Coast Casualty Company under the terms of said "Agency Agreement," subsequent to the 28th day of February, 1916, and prior to the 30th day of June, 1916, the sum of at least $162,000, being the amount equal to the aggregate amount of the legal loss reserves of the Pacific Coast Casualty Company, as of December 31, 1915; less said credits as aforesaid.

That thereupon, and on or about the 30th day of June, 1916, and pursuant to the terms of said "Reinsurance Agreement," and said "Agency Agreement" the Casualty Company of America demanded from the Pacific Coast Casualty Company, the assignment to it in cash or securities acceptable to it, of amounts equal and corresponding to the said unearned premiums or premium reserves, under said "Reinsurance Agreement," and the amount equal to said legal loss reserves due under the terms of said "Agency Agreement," and to protect and indemnify it, the said Casualty Company of America for and from the said disbursements so made by it on behalf of the said Pacific Coast Casualty Company, and to indemnify it for liabilities, disbursements, loss and expenditures then accruing and thereafter to accrue under the terms of each of said agreements; that pursuant to said demand and to the terms of said agreements and each of them, and on the 30th day of June, 1916, at the City of New York, State of New York, said Pacific Coast Casualty Company, duly made, executed, and delivered to the

Casualty Company of America, its written assignment of said securities described in paragraph VI hereof, in words and figures as follows, to wit:

"June 30, 1916.

For and in consideration of One Dollar ($1.00) and other good and valuable considerations, the receipt whereof is hereby acknowledged and confessed, the Pacific Coast Casualty Company, a foreign corporation organized under the [37] laws of the State of California and having its principal office in the City of San Francisco in said State, hereby sells, assigns, transfers and sets over unto the Casualty Company of America, a domestic corporation organized under the laws of the State of New York, having its principal office in the City and County of New York in said State, all bonds now deposited by, and belonging to the said Pacific Coast Casualty Company, with the Commissioner of Insurance of the State of California, and deposited with the Treasurer of the State of California, as evidenced by the official receipts of the said Commissioner of Insurance therefor, to have and to hold unto the said Casualty Company of America, its successors and assigns forever.

IN WITNESS WHEREOF, the said Pacific Coast Casualty Company has caused these presents to be subscribed by its President, the day and year first above written.

Signed and delivered in the presence of
PACIFIC COAST CASUALTY COMPANY.
By T. L. MILLER (Signed),
President.

Witness:
CHARLES S. FORBES (Signed).

State of New York,
County of New York,—ss.

On this thirtieth day of June, 1916, before me duly came Thomas L. Miller, to me known and known to me to be the President of the Pacific Coast Casualty Company, the corporation described in and who executed the foregoing instrument, by me being duly sworn deposes and says that he is the President of the Pacific Coast Casualty Company, aforesaid, that he executed the foregoing instrument by reason of [38] authority duly conferred upon him by the Directors and by-laws of the said Pacific Coast Casualty Company, and then he was duly authorized to execute the same on behalf of the said Pacific Coast Casualty Company.

MARY I. CAMPBELL,
Notary Public in and for the County of Kings."

That no cash except said sums and said premiums collected under the terms of said "Reinsurance Agreement" and applied as aforesaid under the terms of said "Agency Agreement," hereinabove specified and no securities except those assigned by the foregoing assignment, were ever assigned or set over by the Pacific Coast Casualty Company to the Casualty Company of America, under the terms of either of said agreements.

XIX.

That by reason of the premises, plaintiff in intervention is entitled to the possession of, and is entitled to and has a prior lien superior to any claim asserted by any defendant in intervention herein, in and to the said securities comprising the said deposit and the whole thereof under and by virtue of the said "Reinsurance Agreement" and said "Agency Agreement" and the said assignment of the securities comprising the said deposit to it for the full amount of said unearned premiums or premium reserve in said sum of $67,895.83, and for the full amount of said loss reserves of said Pacific Coast Casualty Company as of December 31, 1915, less credits as hereinabove alleged, to wit: a sum in excess of the sum of $71,143.19.

XX.

That by reason of the premises plaintiff in intervention is entitled to the possession of and is entitled to and has a prior lien superior to any claim asserted by any defendant in intervention [39] herein, in and to said securities comprising said deposit now in the possession of Friend William Richardson, State Treasurer, to reimburse and indemnify said Casualty Company of America and himself as Superintendent of Insurance and as liquidator thereof, for the full amount of the disbursements already made and the liabilities and obligations accruing and accrued against the said Casualty Company of America and its assets and for disbursements, costs and expenses in sums exceeding the sum of $70,000 and upwards under the terms of said "Reinsurance

Agreement," and for the full balance of said disbursements, costs, and expenses made by said Casualty Company of America, and plaintiff in intervention under the terms of said "Agency Agreement," aggregating the sum of $71,143.19 and upwards.

XXI.

That this plaintiff in intervention is informed and believes and accordingly alleges that on or about the 30th day of June, 1916, said Casualty Company of America duly notified the Insurance Commissioner of the State of California of the said assignment hereinabove in paragraph XVIII hereof set forth and the making thereof by said Pacific Coast Casualty Company to said Casualty Company of America; that thereafter and on or about the 15th day of March, 1917, this plaintiff in intervention duly notified in writing said defendant in intervention John C. Lynch, as receiver of said Pacific Coast Casualty Company, and said defendant in intervention Alexander McCabe, as Insurance Commissioner of the State of California, of the said assignment and the making thereof by said Pacific Coast Casualty Company to said Casualty Company of America.

XXII.

That prior to filing his petition for leave to intervene herein, plaintiff in intervention made written demand upon the said defendant in intervention, Alexander McCabe, as Insurance Commissioner [40] of the State of California, and upon said defendant in intervention, Friend William Richardson, Treasurer of the State of California, for the delivery to him, the said plaintiff in intervention, of the said

securities and the whole thereof, but that said defendants in intervention, and each of them, refused and neglected, and have ever since refused and neglected to deliver the same or any part thereof, to this plaintiff in intervention.

XXIII.

That your plaintiff is informed and believes, and therefore alleges, that the defendants in intervention and each of them other than said Insurance Commissioner and Treasurer of the State of California, claim the whole or portions of said securities comprising the deposit held by said Treasurer of the State of California, but that said claims and each of them are without right and are subsequent, subject, and inferior to the claims of plaintiff in intervention; that plaintiff in intervention is informed and believes, and therefore alleges that the defendants in intervention other than Alexander McCabe as Insurance Commissioner of the State of California, Friend William Richardson, as Treasurer of the State of California, and all other policy or bond holders of said Pacific Coast Casualty Company by policies of insurance, instruments of suretyship, or otherwise, did not have or hold accrued claims against said Pacific Coast Casualty Company on the 30th day of June, 1916.

XXIV.

That thereafter, and on or about the 6th day of December, 1916, said Pacific Coast Casualty Company was adjudged to be insolvent herein, and defendant in intervention, John C. Lynch, was appointed by this Court, the receiver thereof.

XXV.

That by reason of the premises plaintiff in intervention claims the said securities comprising the said deposit and the whole thereof adversely to each and all of the defendants in intervention herein. [41]

WHEREFORE, plaintiff in intervention prays judgment against the defendants for delivery to him of all the securities mentioned and referred to in this complaint in intervention and for such other and further relief as may be meet and proper in the premises.

HARTLEY F. PEART,
Attorney for Plaintiff in Intervention.

State of California,
City and County of San Francisco,—ss.

Hartley F. Peart, being first duly sworn, deposes and says: That he is the attorney for the plaintiff in intervention, Jesse S. Phillips, as Superintendent of Insurance of the State of New York, and Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, in the above-entitled action; that affiant has his office in the City and County of San Francisco in said State; that neither the said plaintiff in intervention, nor his said agent and liquidator, said Moses James Wright, is a resident of or is now within the said City and County of San Francisco, the place where affiant has his office, or the State of California; that said Jesse S. Phillips and said Moses James Wright reside and are now in the State of New York; that for said cause, said plaintiff

in intervention is unable to verify this complaint in intervention; that the facts are within the knowledge of affiant; that affiant has read the foregoing complaint in intervention and knows the contents thereof; that the same is true of his own knowledge, except as to those matters that are therein stated on information or belief, and as to those matters, that he believes it to be true.

HARTLEY F. PEART.

Subscribed and sworn to before me this 2d day of October, 1917.

[Seal] J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [42]

[Endorsed]: Filed Oct. 2, 1917. Walter B. Maling, Clerk. [43]

(Title of Court and Cause.)

Answer of Defendant Friend William Richardson, as Treasurer of the State of California.

Comes now defendant Friend William Richardson, as Treasurer of the State of California, and answering the complaint in the above-entitled action denies and alleges as follows:

1. Said defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in Paragraph II of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

2. Upon the same ground said defendant denies

each and every allegation contained in Paragraph III of the complaint.

3. Upon the same ground said defendant denies each and every allegation contained in Paragraph IV of the complaint.

4. Upon the same ground said defendant denies each and every allegation contained in Paragraph V of the complaint.

5. Upon the same ground said defendant denies each and every allegation contained in Paragraph VI of the complaint.

6. Said defendant denies each and every allegation contained in Paragraph VII of the complaint except as hereinafter specifically alleged and set forth.

7. Answering Paragraph VIII of the complaint, said defendant denies each and every allegation in said paragraph contained except as is hereinafter specifically alleged and set forth, and denies that the list of securities in said paragraph is true and correct. Said defendant will furnish a true and correct list at the time of the trial, or at any sooner time upon request.

8. Said defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in Paragraph IX of the complaint, and therefore and upon that ground denies each and every allegation in said [44] paragraph contained.

9. Upon the same ground said defendant denies each and every allegation contained in Paragraph X of the complaint.

10. Upon the same ground said defendant denies each and every allegation contained in Paragraph XI of the complaint.

11. Further answering said complaint and as a separate defense thereto, said respondent alleges:

That the securities referred to in said complaint were received by said defendant from the Insurance Commissioner of the State of California after deposit thereof had been made with the said Insurance Commissioner by the Pacific Coast Casualty Company; that under the terms of said deposit the securities were to be held for the benefit of the policy-holders of the Pacific Coast Casualty Company. Said defendant is informed and believes and therefore alleges that there are numerous outstanding policy-holders of the Pacific Coast Casualty Company whose claims are unpaid and that the amount of the claims of said policy-holders exceeds the value of said securities and that until said policy-holders are paid pursuant to the terms of said deposit, said respondent holds and claims to hold the said securities for the purpose of the trust created by the aforesaid deposit.

12. Further answering said complaint and as a separate defense thereto said defendant alleges: That provision is and at all times herein mentioned was made in Section 618 of the Political Code of the State of California for a deposit with the Treasurer of the State of California of securities deposited with the Insurance Commissioner by insurance companies pursuant to the terms of said section of the Political Code. That pursuant to said section of

the Political Code the securities referred to in the complaint came into said defendant's possession on deposit as Treasurer of the State of California. That it is provided in Section 618 of the said Political Code of the State of California that such securities [45] shall remain as security for the benefit of policy-holders of the company by whom the deposit was made. Said defendant is informed and believes and therefore alleges that there are numerous outstanding policy-holders of the Pacific Coast Casualty Company whose claims are unpaid and that the amount of the claims of said policy-holders exceeds the value of said securities and that until said policy-holders are paid pursuant to the terms of said deposit, said defendant holds and claims to hold the said securities for the purpose of the trust created by the aforesaid deposit. Defendant alleges upon information and belief that the Pacific Coast Casualty Company is insolvent, and said defendant alleges that the Pacific Coast Casualty Company is insolvent and that said securities are not to be withdrawn but are to be held for administration pursuant to the terms of the Political Code of the State of California and the purposes of trust created at the time of the deposit of said securities.

13. Further answering said complaint and as a separate defense thereto said defendant alleges: That in proceedings pending in the Superior Court of the State of California against the Pacific Coast Casualty Company, numerous garnishments pursuant to writs of attachment were levied upon said de-

fendant as Treasurer of the State of California. That all debts, credits, securities and other personal property belonging to the Pacific Coast Casualty Company and in the possession or control of said defendant were attached. That said garnishments pursuant to said writs of attachment are now in full force and effect and amount in the aggregate to the sum of twenty-six thousand three hundred eighty-six dollars and forty-eight cents ($26,386.48) besides interest and costs. That said garnishments were issued in the following cases: [46]

Name of Case	Principal Amount Claimed.
M. J. Mulvihill v. Pac. Co. Cas. Co.....	$ 2,500.00
Eugene Schuler v. Pac. Co. Cas. Co.....	964.50
Theodore Veyhle and Elmo Collins v. Pac. Co. Cas. Co.....	4,600.00
Sadie Ann Billings v. Pac. Co. Cas. Co....	3,373.80
Fidelity & Deposit Co. of Md. v. Pac. Co. Cas. Co.....	14,948.18
Los Angeles Rock & Gravel Co. v. Carroll et al	896.89
National Union Fire Ins. Co. v. Pac. Co. Cas. Co.....	1,000.00
Henry Weileman v. Pac. Co. Cas. Co.....	881.60
Weileman et al. vs. Pac. Co. Cas. Co. and Casualty Company of America.....	2,936.90
Anna McPherson et al. v. Hoyst et al.....	307.70

13. Further answering said complaint said defendant alleges that he has been informed that the securities referred to in the complaint were assigned and transferred by the Pacific Coast Casualty Com-

pany prior to the commencement of this action. That said defendant is unable to determine the validity of such assignment or assignments and prays that proper issues be framed in this court for the determination of the question of the validity of said assignments and that said defendant be given full protection in the premises and that this Court make an order directing that all interested and necessary parties be brought before the Court for the determination of said issue.

14. Further answering said complaint and as a separate defense thereto, said defendant alleges: That said defendant holds the securities in the complaint as a trustee and to be delivered by him only to the person or persons legally entitled thereto. That numerous persons have made claims and demands upon said defendant for the whole or a portion of said securities and unless said defendant is protected by a valid order, judgment and decree of this court, said defendant is in jeopardy of contesting conflicting claims and demands in different courts, and unless all of the parties making said claims and demands are brought before this Court, said defendant will not be protected by any order, judgment or decree made herein. That said defendant invokes the [47] aid of this Court to the end that it may bring before it all persons making claims and demands and claiming an interest in said securities or any part thereof, that the claims may be litigated and contested and an order, judgment and decree may be made binding all of the parties making any claim to said securities or any part thereof.

15. That William Gow and Jesse S. Phillips, Superintendent of Insurance of the State of New York, have made claims upon said defendant for the whole or a portion of said securities and defendant invokes the aid of this Court to the end that said persons may be brought before it and their claims litigated and contested and an order, judgment and decree may be made binding all of the parties making any claim to said securities or any part thereof.

U. S. WEBB,
Attorney General.

ALFRED C. SKAIFE,
GUY LEROY STEVICK,
REDMAN & ALEXANDER,
Attorneys for Defendant Friend William Richardson, as Treasurer of the State of California.

United States of America,
State of California,
County of Sacramento,—ss.

Friend William Richardson, being first duly sworn, deposes and says: That he is the Treasurer of the State of California and as such is one of the defendants in the above-entitled action. That he has read the foregoing answer to the complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information or belief and that as to such matters he believes it to be true.

FRIEND WM. RICHARDSON.

Subscribed and sworn to before me this 21st day of September, 1917.

[Seal] B. GRANT TAYLOR,
Clerk of the Supreme Court of the State of California.

By Ray C. Waring,
Deputy. [48]

Service of the within answer admitted this 1st day of Oct. 1917.

HIRAM W. JOHNSON, Jr.,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 11, 1917. Walter B. Maling, Clerk. [49]

(Title of Court and Cause.)

Supplemental Answer of Defendant Alexander McCabe, as Insurance Commissioner of the State of California.

Comes now the defendant Alexander McCabe, the Insurance Commissioner of the State of California, after leave of Court first had and obtained, and files this Supplemental Answer to his Answer on file in said action, and alleges:

That all the allegations in said answer are true, and are hereby made a part hereof, and that in addition to the writs, notices, and demands served upon him, set out in allegation III of said Answer, there was served upon him as such Insurance Commissioner, on the 1st day of October, 1917, by the Sheriff of the City and County of San Francisco a Writ of

Execution, upon a certain Judgment recovered in the Superior Court of the State of California in and for the County of Los Angeles, State of California, by Louise Baldarachi and Frederick Baldarachi vs. The Pacific Coast Casualty Company, a corporation, on the 7th day of May, 1917, for the sum of Two Thousand, Two Hundred and One Dollars and five cents ($2,201.05), with interest from the 15th day of May, 1916, at the rate of seven per cent (7%) per annum until paid, together with Fourteen Dollars and forty-five cents ($14.45) costs at the date of judgment, and accruing costs, amounting to the sum of Two Dollars and twenty-five cents ($2.25).

WHEREFORE, said defendant prays judgment as set out in said answer.

JOHN W. STETSON,

Attorney for Defendant Alexander McCabe, as Insurance Commissioner of the State of California.

[Endorsed]: Filed Oct. 30, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [50]

(Title of Court and Cause.)

Notice of Motion for Judgment.

To Friend William Richardson, as Treasurer of the State of California, and U. S. Webb, Attorney General, Alfred C. Skaefe, Guy Leroy Stevick and Redmond & Alexander, His Attorneys, and to Alexander McCabe, Insurance Commissioner of the State of California, and John W. Stetson, His Attorney:

PLEASE TAKE NOTICE that the plaintiff will, on Monday, the 19th day of November, 1917, at the United States postoffice and courthouse building, in the city and county of San Francisco, State of California, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the Court for judgment on the pleadings in said action, on the ground that the answers are, and each of the answers filed therein is, frivolous, and that on the allegations and admissions of said answers, taken in connection with the allegations of the complaint in said action, plaintiff is entitled to judgment.

This motion will be based upon the pleadings on file in said action.

Dated November 5th, 1917.

HIRAM W. JOHNSON, Jr., and
A. A. DE LIGNE,
Attorneys for Plaintiff.

Received a copy of the within Notice of Motion for Judgment, this 6th day of November, 1917.

A. C. SKAIFE,
REDMAN & ALEXANDER,
GUY LEROY STEVICK,
U. S. WEBB,
JOHN T. NOURSE,
Attys. for Richardson, Treasurer.

[Endorsed]: Filed Nov. 7, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [51]

(Title of Court and Cause.)

Admission of Service.

Due service and receipt of copy of notice of motion of Jesse S. Phillips as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, for permission to intervene herein with his verified complaint in intervention annexed, is hereby admitted this 6th day of October, A. D. 1917.

A. A. DE LIGNE,
HIRAM W. JOHNSON, Jr.,
Attorneys for John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a Corporation, Plaintiff.

JOHN W. STETSON,
(By J. F. McK.),
Attorney for Alexander McCabe, as Insurance Commissioner of the State of California, Defendant.

U. S. WEBB,
JOHN T. NOURSE,
Attorneys for Friend William Richardson, as Treasurer of the State of California, Defendant.

[Endorsed]: Filed Nov. 12, 1917. Walter B. Maling, Clerk. [52]

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,079.

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, et al.,

Defendants.

Amended Answer of Defendant Friend William Richardson, as Treasurer of the State of California.

Comes now defendant Friend William Richardson, as Treasurer of the State of California, and by leave of Court first had and obtained files his amended answer, and denies and alleges as follows:

1. Said defendant admits that on or about the 17th day of November, 1916, Daniel Coombs filed in this court an action as in Paragraph II in the complaint of plaintiff on file herein set forth. But in this behalf said defendant avers that this Court was without jurisdiction to hear or determine the issues in said action, or any thereof, or to grant the relief therein prayed for or obtained, or any part thereof, save and except to render a money judgment to said Daniel Coombs for the amount of his claim; that

Pacific Coast Casualty Company was at all of the times herein mentioned, and now is, a bonding and casualty insurance corporation, organized and existing **[53]** under and by virtue of the law of the State of California, and deriving all of its powers from the laws of said State; that in the complaint filed in the said action referred to, in Paragraph II of the complaint herein, it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and liabilities; that the Insurance Commissioner of the State of California has never certified to the Attorney General of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty Company under the provisions of Chapter 5, Title 10, Part 2, of the Code of Civil Procedure of the State of California. That the action referred to in Paragraph II of the complaint herein was not brought under or in accordance with the provisions of Section 604 of the Political Code of the State of California, or the provisions of the Code of Civil Procedure of the State of California therein referred to; that Section 604 of the Political Code of the State of California, and the sections of the Code of Civil Procedure of the State of California therein referred, provide the sole and exclusive method of liquidating the business and affairs of the Pacific Coast Casualty Company.

2. Defendant denies that thereafter, to wit, on the 6th day of December, 1916, after due proceed-

ings in that behalf had and obtained, or either thereof, in said original or any action, or at any time, this Court duly or at all gave, made and entered, or gave or made or entered, its order and decree, or order or decree, appointing plaintiff receiver of this court of all and singular, or all or singular, the lands, tenements and hereditaments, or either or any thereof, of said Pacific [54] Coast Casualty Company, and of, or of, all personal assets thereof of every kind, or all or any of the personal or any assets thereof of every or any kind, and including, or including, all sum or sums of money due and payable, or due or payable, or to become due and payable or due or payable, to it, and of or of all or any of its office furniture, books of account, or either or any thereof, and other, or other, personal, or any, property, of any or every name, nature and description, or name or nature or description, or of all or any of the stocks, bonds, obligations, choses in action, accounts and rights under contracts, or either or any thereof, now owned and possessed, or now or at all owned or possessed, by said corporation, and together with, or together with, all or any of its corporate rights, franchise, incomes and profits, or either or any thereof, of every or any description in this district or elsewhere, and to have and to hold, or to have or to hold, the same as an officer of and under the orders and directions, or as an officer of, or under the orders, or any orders, or directions, or any direction, of this, or any, court, and that, or that, plaintiff as such receiver, or otherwise, was by said order and decree,

or by said or any order or decree, thereby or at all authorized and directed, or authorized or directed, to take immediate or any possession of all and singular, or all or singular, the property described, or any thereof, or any property; and in that behalf said defendant alleges the true fact to be that the purported order appointing plaintiff receiver, was and is null and void and of no force or effect, and that the above-entitled court was and is without jurisdiction or power to appoint said plaintiff as receiver of said Pacific Coast Casualty Company for the purposes alleged, or for any purpose. [55]

3. Said defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in Paragraph IV of the complaint, and therefore and upon that ground denies each and every allegation in said paragraph contained.

4. Denies that the plaintiff thereafter, to wit, on the sixth day of November, 1916, or at any time, duly or at all qualified as such Receiver, and denies that ever since said day, or at any time, he has been, and now is, or ever since said or any day, he has been or now is, the duly appointed, and qualified and acting, or the duly or at all appointed or qualified or acting Receiver of this Court in said or any action; and in that behalf said defendant alleges the true fact to be that the purported order appointing plaintiff Receiver, was and is null and void and of no force and effect, and that the above-entitled court was and is without jurisdiction or power to appoint said plaintiff as Receiver of said Pacific Coast Casualty Com-

pany for the purposes alleged, or for any purpose.

5. Said defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in Paragraph VI of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

6. Denies that the securities referred to in the complaint were delivered to the Insurance Commissioner of the State of California, or deposited with the State Treasurer of the State of California; and in that behalf alleges that the list of securities set forth in the complaint is not true or correct. Defendant further alleges that certain securities were delivered to said Insurance Commissioner and deposited with the State Treasurer, but denies that they were for the purposes, or [56] any purpose, set forth in the complaint.

7. Denies that the securities referred to in Paragraph VIII of the complaint, or any thereof, were delivered to the Insurance Commissioner, or deposited with the Treasurer of the State of California, for the purposes, or any purpose, referred to in the complaint, and denies that the list of securities, as set forth in the complaint, were delivered to said Insurance Commissioner, or deposited with said State Treasurer for any purpose, and alleges that said list is not true or correct.

8. Denies that said, or any, securities should be subject to judgment, orders and decrees, or any thereof, in this action. And in this behalf said defendant avers that this Court was without jurisdic-

tion to hear or determine the issues in the action in which plaintiff herein was appointed Receiver, or any thereof, or to grant the relief therein prayed for or obtained, or any part thereof, save and except to render a money judgment to said Daniel Coombs for the amount of his claim, or to appoint plaintiff Receiver of the Pacific Coast Casualty Company; that the Pacific Coast Casualty Company was at all of the times herein mentioned and now is a bonding and casualty insurance corporation, organized and existing under and by virtue of the law of the State of California and deriving all of its powers from the laws of said State; that in the complaint filed in the action referred to in Paragraph II of the complaint herein, it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and liabilities; that the Insurance Commissioner of the State of California has never certified to the Attorney General of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty [57] Company under the provisions of Chapter 5, Title 10, Part 2 of the Code of Civil Procedure of the State of California, That the action referred to in Paragraph II of the complaint herein was not brought under or in accordance with the provisions of Section 604 of the Political Code of the State of California and the provisions of the Code of Civil Procedure of the State of California therein referred to; that Section

604 of the Political Code of the State of California, and the Sections of the Code of Civil Procedure of the State of California, therein referred to, provide the sole and exclusive method of liquidating the business and affairs of the Pacific Coast Casualty Company.

9. Said defendant denies that the alleged securities, or any thereof, so or at all delivered to the Insurance Commissioner of the State of California, and by him, or by him, deposited with the Treasurer of the State of California, were delivered to the Insurance Commissioner and by him, or by him, deposited with said Treasurer, and are, or are, now held by said Treasurer, subject to disposition thereof for the benefit of all or any of the policy-holders of said corporation by such or any court as should acquire jurisdiction of the subject-matter thereof, either in the event that said corporation should cease business and become, or should cease business or become, insolvent, and should fail, or should fail, to pay liabilities, or any thereof, which should accrue to the policy-holders, or any policy-holder of said corporation, as the same, or any thereof, should fall due; and in that behalf said defendant alleges that if the said securities are to be administered, they must be administered pursuant to Section 604 of the Political Code of the State of California, and the sections of the Code of Civil Procedure therein referred to, and that the administration of said fund and the method therein referred to, is the sole and exclusive [58]. method of liquidating the business and affairs of the Pacific Coast

Casualty Company and of the securities referred to in the complaint, or any thereof.

10. Said defendant alleges that he has no information or belief upon the subject sufficient to enable him to answer the allegations contained in Paragraph X of the complaint and therefore and upon that ground denies each and every allegation in said paragraph contained.

11. Denies that this Court has acquired and assumed, or has acquired or assumed, jurisdiction of said securities deposited with the defendant, as alleged or otherwise, or any security or securities, as well as, or as well as, all or any other property of the Pacific Coast Casualty Company, within this district, and including, or including jurisdiction to determine and enforce, or to determine or enforce, the rights, or any right, of policy-holders, creditors and others, or either or any thereof, therein and thereto, or therein or thereto, and denies that plaintiff as the officer and receiver, or officer or receiver of this court, or otherwise, and by virtue or by virtue of the orders and directions, or orders or any order, or directions or any direction of this Court, as alleged or otherwise, is entitled to the possession of said securities, or any thereof, and to hold, or to hold, the same subject to such orders and decrees, or to such or any order or orders, or decree or decrees, as to the disposition and application thereof, or the disposition or application thereof the Court may hereafter, or at all, make in said original or any action.

12. Further answering said complaint and as a separate defense thereto, said defendant alleges that

it was not the purpose of the action of Daniel Coombs v. Pacific Coast Casualty Company in said complaint referred to, to obtain the appointment [59] of the receiver to acquire possession of the securities in the complaint herein described, or any thereof; that the complaint on file in said action of Daniel Coombs vs. Pacific Coast Casualty Company, alleged that said Pacific Coast Casualty Company had deposited with the Treasurer of the State of California the said securities; that said securities were of the value of Two Hundred and Fifty Thousand Dollars ($250,000) or thereabouts; that the said securities were held by the Treasurer of the State of California under the direction of the Insurance Commissioner of said State; that the liabilities of the Pacific Coast Casualty Company exceed the sum of Four Hundred Thousand Dollars ($400,000) or thereabouts; that the assets of said corporation, aside and apart from said securities, did not exceed the sum of Three Hundred Thousand Dollars ($300,000) or thereabouts, and that the Insurance Commissioner of the State of California would not permit said Pacific Coast Casualty Company to withdraw said securities, or any part thereof.

13. Further answering said complaint and as a separate defense thereto, said defendant alleges that this Court was without jurisdiction to hear or determine the issues in said "Original Action," or any thereof, or to grant the relief therein prayed for or obtained, or any part thereof, save and except to render a personal money judgment in favor of Daniel Coombs for the amount of his claim; that the

Pacific Coast Casualty Company was at all of the times herein mentioned, and now is, a bonding and casualty insurance corporation, organized and existing under and by virtue of the law of the State of California and deriving all of its powers from the laws of said State; that in the complaint filed in the action referred to in Paragraph II of the complaint herein, it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and **[60]** liabilities; that the Insurance Commissioner of the State of California has never certified to the Attorney General of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty Company under the provisions of Chapter 5, Title 10, Part 2 of the Code of Civil Procedure of the State of California. That the action referred to in Paragraph II of the complaint herein was not brought under or in accordance with the provisions of Section 604 of the Political Code of the State of California and the sections of the Code of Civil Procedure of the State of California therein referred to.

14. Further answering said complaint and as a separate defense thereto, said defendant denies that the plaintiff has any right, title or interest in or to the securities referred to in the complaint, or any thereof, and denies that he is entitled to the possession thereof.

15. Further answering said complaint and as a separate defense thereto, said defendant alleges

upon information and belief that the securities referred to in the complaint in the above-entitled action were assigned and transferred to the Casualty Company of America, a corporation created and existing under and by virtue of the laws of the State of New York, and that said assignment was made and executed, on or about the first day of June, 1916, and prior to the commencement of "Original Action" No. 320 in Equity, referred to in the complaint in the above-entitled action.

16. Further answering said complaint and as a separate defense thereto, defendant alleges upon information and belief that prior to the commencement of "Original Action" No. 320 in Equity, referred to in the complaint in the above-entitled **[61]** action, the Pacific Coast Casualty Company had reinsured all of its unexpired policies and that all of its liabilities under such policies had been assumed by another responsible company, to wit, the Casualty Company of America, and thereupon and prior to the commencement of said "Original Action" all of the securities referred to in the complaint were assigned and transferred to the said Casualty Company of America.

17. Further answering said complaint and as a separate defense thereto, said defendant alleges upon information and belief that prior to the commencement of said "Original Action" referred to in the complaint, the Pacific Coast Casualty Company had ceased to do business in the State of New York, and conclusive evidence was filed that all policies written in said State of New York had expired

or been paid or cancelled or reinsured, and thereafter and prior to the commencement of said "Original Action" said Pacific Coast Casualty Company assigned and transferred the securities referred to in the complaint to the Casualty Company of America.

18. Further answering said complaint and as a separate defense thereto said defendant alleges upon information and belief that prior to the commencement of said "Original Action" No. 320 in Equity, the securities referred to in the complaint in the above-entitled action and all right, title and interest therein, were assigned and transferred to the Casualty Company of America, a corporation.

19. Further answering said complaint and as a separate defense thereto, defendant alleges upon information and belief that at the time of the commencement of said "Original Action" No. 320 in Equity, the Pacific Coast Casualty Company had no right, title or interest in or to any of the securities referred to in the complaint in this action, and had no right **[62]** to the possession thereof, and the plaintiff above named never acquired any right, title or interest, or right to possession of said securities, or any thereof.

20. And for a further and separate answer to said complaint said defendant avers that the appointment of plaintiff as receiver of Pacific Coast Casualty Company was void and that this Court was without jurisdiction to make such appointment; that on or about the 17th day of November, 1916, Daniel Coombs filed in this court an action against

Pacific Coast Casualty Company, a corporation, for the purpose and with the object of having a receiver of said corporation appointed by this Court, and having all the property and assets of said corporation taken into the possession of this Court, through the receiver thus to be appointed and said property and assets applied to the payment of all the outstanding debts and liabilities of said corporation. That this Court was without jurisdiction to hear or determine the issues in said action, or any thereof, or to grant the relief therein prayed for or obtained, or any part thereof, except to render a personal money judgment in favor of Daniel Coombs for the amount of his claim; that the order purporting to appoint the plaintiff herein receiver, was void and without the jurisdiction of this Court.

21. Further answering said complaint and as a separate defense thereto, said defendant alleges that certain of the securities referred to in the complaint were delivered to the Insurance Commissioner of the State of California and deposited with the State Treasurer of the State of California pursuant to the terms of an express trust and that the securities which were deposited are now held subject to the terms of the aforesaid trust, and the defendants hold and claim to hold the securities so deposited for the purposes of the trust created at the time of the **[63]** aforesaid deposit. That said securities so deposited are held and defendants claim to hold them for the purposes of administration pursuant to the terms of said trust, and the delivery of said securities, or any of them, to the receiver above

named, would violate the provisions of said trust.

22. Further answering said complaint and as a separate defense thereto said defendant alleges: That in proceedings pending in the Superior Court of the State of California against the Pacific Coast Casualty Company, numerous garnishments pursuant to writs of attachment were levied upon said defendant as Treasurer of the State of California. That all of said levies were made prior to the commencement of said "Original Action" No. 320 in Equity and that all debts, credits, securities and other personal property belonging to the Pacific Coast Casualty Company and in the possession or control of said defendant were attached. That said garnishments pursuant to said writs of attachment are now in full force and effect and amount in the aggregate to the sum of twenty-six thousand three hundred eighty-six dollars and forty-eight cents ($26,386.48), besides interest and costs. That said garnishments were issued in the following cases:

Name of Case.	Principal Amount Claimed.
M. J. Mulvihill v. Pac. Co. Cas. Co.	$2,500.00
Eugene Schuler v. Pac. Co. Cas. Co.	964.50
Theodore Veyhle and Elmo Collins v. Pac. Co. Cas. Co.	4,600.00
Sadie Ann Billings v. Pac. Co. Cas. Co.	3,373.80
Fidelity & Deposit Co. of Ed. v. Pac. Cas. Co.	14,948.18
Los Angeles Rock & Gravel Co. v. Carroll et al.	896.89

Name of Case.	Principal Amount Claimed.
National Union Fire Ins. Co. v. Pac. Co. Cas. Co.....	1,000.00
Henry Weileman v. Pac. Co. Cas. Co.....	881.60
Weileman et al. v. Pac. Co. Cas. Co. and Casualty Company of America.....	2,936.90
Anna McPherson, et al. v. Hoyst, et al.....	307.70

23. Further answering said complaint and as a separate defense thereto, said defendant alleges: That said defendant holds the securities referred to in the complaint as **[64]** a trustee and to be delivered by him only to the person or persons legally entitled thereto. That numerous persons have made claims and demands upon said defendant for the whole or a portion of said securities, and unless said defendant is protected by a valid order, judgment and decree of the court, said defendant is in jeopardy of contesting conflicting claims and demands in different courts, and unless all of the parties making said claims and demands are brought before this Court, said defendant will not be protected by any order, judgment or decree made herein. That said defendant invokes the aid of this Court to the end that it may bring before it all persons making claims and demands and claiming an interest in said securities, or any part thereof, that the claims may be litigated and contested and an order, judgment and decree may be made binding all of the parties making any claim to said securities or any part thereof. That William Gow, Jesse S. Phillips, Superintendent of Insurance of the State of New

York, M. J. Mulvihill, Eugene Schuler, Theodore Veyhle, Sadie Ann Billings, Fidelity & Deposit Company of Maryland, Los Angeles Rock & Gravel Co., National Union Fire Insurance Company, Henry Weileman, Weileman, et al., and Anna McPherson, et al., have made claims upon said defendant for the whole or a portion of the securities, and defendant invokes the aid of this Court to the end that all of said persons may be brought before it and their claims litigated and contested and an order, judgment and decree may be made binding all of the parties making any claim to said securities, or any part thereof.

24. Further answering said complaint and as a separate defense thereto, defendant alleges that the above-entitled Court has no jurisdiction of the subject of the above-entitled action, or of the parties to said action, and in that **[65]** behalf alleges that all of the parties to the above-entitled action were at the time of the commencement of said action, and ever since have been and now are, residents and citizens of the State of California.

25. Further answering said complaint and as a separate defense thereto said defendant alleges upon information and belief that the securities referred to in the complaint in the above-entitled action were assigned and transferred to the Casualty Company of America, a corporation, on or about the first day of June, 1916, and prior to the commencement of "Original Action" No. 320 in Equity, referred to in the complaint, in the above-entitled action, and that subsequent to said assignment and

in the month of June, 1916, and prior to the commencement of "Original Action" No. 320 in Equity, referred to in the complaint in the above-entitled action, said Casualty Company of America assigned and transferred said securities to William Gow. That by virtue of said assignments William Gow claims said securities and the right to the possession thereof and has instituted an action in the Superior Court of the State of California in and for the City and County of San Francisco against the above-named defendants for the purpose of recovering said securities from said defendants. That said action is now pending in said Superior Court.

WHEREFORE, said defendant prays that plaintiff take nothing by this action; and that William Gow, Jesse S. Phillips, Superintendent of Insurance of the State of California, M. J. Mulvihill, Eugene Schuler, Theodore Veyhle, Sadie Ann Billings, Fidelity & Deposit Company of Maryland, Los Angeles Rock & Gravel Co., National Union Fire Insurance Company, Henry Weileman, et al., and Anna McPherson, et al., may be brought **[66]** before this Court by appropriate processes to the end that their claims, as well as the plaintiff's, may be litigated and contested and that an order be made bringing said parties before this Court to the end that a judgment and decree may be made binding all of the parties making any claim to said securities, or any part thereof, and protecting the defendants in the above-entitled action from conflicting claims

and demands and preventing a multiplicity of actions and suits.

U. S. WEBB,
Attorney General of the State of California.
ALFRED C. SKAIFE,
GUY LEROY STEVICK,
REDMAN & ALEXANDER,
Attorneys for Defendant Friend William Richardson, as Treasurer of the State of California. **[67]**

United States of America,
State of California,
City and County of San Francisco,—ss.

Friend William Richardson, being first duly sworn, deposes and says: That he is the Treasurer of the State of California and as such is one of the defendants in the above-entitled action. That he has read the foregoing amended answer to the complaint and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information or belief and as to such matters that he believes it to be true.

FRIEND WM. RICHARDSON.

Subscribed and sworn to before me this 6th day of December, 1917.

[Seal] M. V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

Service of the within answer admitted this 6th day of December, 1917.

HIRAM W. JOHNSON, Jr.,
A. A. DE LIGNE,
Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 6, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,079.

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants.

Amended Answer.

Comes now the defendant Alexander McCabe sued herein as Insurance Commissioner of the State of California, and in that capacity after leave of Court first had and obtained files this amended answer to plaintiff's complaint herein, and admits, denies, and alleges as follows, to wit:

I.

Said defendant admits that on or about the 17th day of November, 1916, Daniel Coombs filed in this court an action as in Paragraph II in the complaint of plaintiff on file herein set forth.

And in this behalf said defendant avers that this court was without jurisdiction to hear or determine the issues in said action or any thereof, or to grant the relief therein prayed for or obtained or any part thereof; that Pacific Coast Casualty Company was at all of the times herein mentioned, and now is, a bonding and casualty insurance company, organized and existing under and by virtue of the law of the State of California, and deriving all of its powers from the laws of said State; that in [69] the complaint filed in the said action, in Paragraph II of said complaint referred to, it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and liabilities;

That the Insurance Commissioner of the State of California has never certified to the Attorney General of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty Company under the provisions of Chapter 5, Title 10, Part 2, of the Code of Civil Procedure of the State of California, that the action referred to in Paragraph II of the complaint herein was not brought upon or in accordance with the provisions of Section 604 of the Political Code of the State of California; that Section 604 of the Political Code of the State of California, and the sections of the Code of Civil Procedure of the State of California, is the sole and exclusive method of liquidating the business and affairs of the Pacific Coast Casualty Company.

II.

Defendant denies that thereafter, to wit, on the 6th day of December, 1916, after due proceedings in that behalf had and obtained, or either thereof, in said original or any action, or at any time, this Court duly or at all gave, made and entered, or gave or made or entered, its order and decree, or order or decree, appointing plaintiff receiver of this Court or all and singular, or all or singular, the lands, tenements and hereditaments, or either or any thereof, of said Pacific Coast Casualty Company and of, or of, all personal assets thereof of every kind, or all or any of the personal or any assets thereof of every or any kind, and including, or including, all sum or sums of money due and payable, or due or payable, or to become due and payable or due or payable, [70] to it, and of, or of all or any of the stocks, bonds, obligations, choses in action, accounts and rights under contract, or either or any thereof, now owned and possessed, or now or at all owned or possessed, by said corporation, and together with, or together with all or any of its corporate rights, franchises, incomes and profits, or either or any thereof, of every or any description in this district or elsewhere, and to have and to hold, or to have or to hold, the same as an officer of and under the orders and directions, or as an officer of, or under the orders, or any order, or directions, or any direction, of this, or any, court, and that, or that, plaintiff as such receiver, or otherwise, was by said order and decree, or by any order or decree, thereby or at all authorized and directed, or authorized or directed, to

take immediate or any possession of all and singular, or all or singular, the property described, or any thereof, or any property; and in that behalf said defendant alleges the true fact to be that the purported order appointing plaintiff receiver, was and is null and void, and the above-entitled court was without jurisdiction to appoint said plaintiff as receiver of said Pacific Coast Casualty Company.

III.

Denies that the plaintiff thereafter, to wit, on the 6th day of November, 1916, or at any time, duly or at all qualified as such receiver, and denies that ever since said day he has been and now is, or ever since said or any day, he has been or now is, the duly appointed, qualified and acting, or the duly or at all appointed or qualified or acting receiver of this court in said action, alleged or otherwise; and in that behalf said defendant alleges the true fact to be that the purported order appointing plaintiff receiver, was and is null and void, and the above-entitled court was without jurisdiction to appoint said plaintiff as receiver of said Pacific Coast Casualty Company. [71]

IV.

Denies that for the purpose and with the object, or for the purpose or with the object of obtaining for itself the right to do casualty insurance business, particularly in the State of New York, and in compliance, or in compliance, with the laws of the State of New York, requiring every or any insurance corporation created under the laws of the State, other than the State of New York, to keep on de-

posit with the Superintendent of Insurance of the State of New York, or with the Auditor, Comptroller, or General Fiscal Officer, securities of the value of $250,000, or any sum for the benefit of all or any of the policy-holders of such corporation, as a condition precedent to the granting of permission to such corporation to do a casualty insurance business in the State of New York, or elsewhere, or otherwise, or at all, said Pacific Coast Casualty Company at any time prior to the filing of the complaint in the action referred to in the complaint now being answered as the "original action," or ever, or at all, delivered to the Insurance Commissioner, to be by him deposited with the Treasurer of the State of California, for the security and benefit, or security, or benefit, of all, or any, of the policy-holders of said company, certain, or any, securities, consisting of bonds of the aggregate value of $250,000 and upwards, or upwards, or any other sum, or at all, except as herein set out, and in this connection said defendant alleges:

That he is informed and believes, and upon such information and belief alleges that the predecessor, or predecessors, of this defendant in the office of the Insurance Commissioner of the State of California received from said Pacific Coast Casualty Company the securities set out in allegation VIII of said complaint, under the provisions of section 618 of the Pol. C. of the State of California, and not otherwise, on deposit and in trust for the [72] policy-holders of such company, and that he did forthwith make a special deposit of the same in the State

Treasury, in packages marked with the name of said company, where the same have since remained as security for policy-holders in said company.

V.

That the said securities so delivered to this defendant and by him deposited with the State Treasurer were delivered to him and deposited with said Treasurer and are now held by State Treasurer subject to disposition thereof for the benefit of the policy-holders of said corporation in the manner required by law and not otherwise, and that said disposition is not dependent upon the event that said corporation should cease business, or become insolvent, or should fail to pay liabilities which should accrue to policy-holders of said corporation as the same shall fall due, but only upon the order of a court of competent jurisdiction in the manner provided by law regardless of whether said corporation should cease business or should become insolvent.

And in this behalf said defendant avers that this Court was without jurisdiction to hear or determine the issues in the action in which plaintiff herein was appointed receiver, or any thereof, or to grant the relief therein prayed for or obtained, or any part thereof, or to appoint plaintiff receiver of the Pacific Coast Casualty Company; that Pacific Coast Casualty Company was at all of the times herein mentioned and now is a bonding and casualty insurance corporation organized and existing under and by virtue of the law of the State of California and deriving all of its powers from the laws of said

State; that in the complaint filed in the action in Paragraph II of this complaint referred to, it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and liabilities; that the Insurance Commissioner of the State of California has never [73] certified to the Attorney General of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty Company under the provisions of Chapter 5, Title 10, Part 2 of the Code of Civil Procedure of the State of California, that the action referred to in Paragraph II of the complaint herein was not brought under or in accordance with the provisions of Section 604 of the Political Code of the State of California; that Section 604 of the Political Code of the State of California, and the sections of the Code of Civil Procedure of the State of California, is the sole and exclusive method of liquidating the business and affairs of the Pacific Coast Casualty Company.

VI.

That it is not true that said Pacific Coast Casualty Company is in the process of liquidation because it is true that the said court has no jurisdiction to liquidate the same as hereinbefore set out.

VII.

Answering allegation XI of said complaint, this defendant denies that said court by reason of the facts set out in said complaint, or otherwise, has acquired and assumed, or acquired, or assumed, ju-

risdiction of said securities received by the predecessor in office of this defendant, or by him deposited in the State Treasury the jurisdiction to determine and enforce, or determine, or enforce, the rights of policy-holders, creditors, and others, or policy-holders, or creditors, or others, therein and thereto, or therein, or thereto, or that said plaintiff is entitled to the possession of said securities and to hold, or to hold, the same subject to such orders and decrees, or orders, or decrees, as to the disposition and application, or disposition, or application, thereof, as the Court [74] may make in said action referred to in said complaint as "original action."

VIII.

And further answering said complaint, this defendant alleges that at various times, subsequent to the receipt by the predecessor of this defendant in office as Insurance Commissioner of the State of California, and prior to any demand upon this defendant by said plaintiff, as set out in allegation XII of said complaint, this defendant has received, and has had served upon him, as Insurance Commissioner of the State of California, and J. E. Phelps, predecessor of this defendant in the office of Insurance Commissioner of the State of California has received and had served upon him, as such Commissioner, various writs of attachment, writs of execution, notices, demands and stipulations, according to the following schedule, upon the dates, and by the persons, and in the amount set out in the schedule following:

Date of Service upon Insurance Commissioner.	Name of Claimant.	Amt.	Description of Demand.
November 3, 1916	Henry Weileman	$2936.90	Execution
November 3, 1916	Henry Weileman	881.60	Execution
November 4, 1916	Sadie Ann Billings et al.	3373.80	Execution
November 6, 1916	H. J. Mulvihill,	2500.00	Execution
September 26, 1916	Anna McPherson Joseph McPherson	307.70	Judgment
June 19, 1917	Clyde C. Struble	6353.84	Writ of Attch.
June 23, 1917	Fidelity & Deposit Co. of Maryland	14948.18	Writ of Attch.
Oct. 1, 1917	Louise Baldarachi & Frederick Baldarachi	2217.75	Judgment
[75]			
November 16, 1917	Theodore Veyhle & Elmo Collins	4600.00	Writ of Attch.
November 28, 1917	J. B. Jones	571.10	Execution

IX.

Further answering said complaint and as a separate defense thereto, said defendant alleges upon information and belief that the securities referred to in the complaint in the above-entitled action were assigned and transferred to the Casualty Company of America, a corporation, created and existing under and by virtue of the laws of the State of New York, and that said assignment was made and executed, on or about the first day of July, 1916, and prior to the commencement of "Original Action," No. 320 in Equity, referred to in the complaint in the above-entitled action.

Further answering said complaint and as a separate defense thereto, defendant alleges upon information and belief that prior to the commencement of "Original Action," No. 320 in Equity, referred to in the complaint in the above-entitled action, the Pacific Coast Casualty Company, had reinsured all of its unexpired policies and all of its liabilities under such policies had been assumed by another responsible company, to wit; the Casualty Company

of America, and thereupon and prior to the commencement of said "Original Action" all of the securities referred to in the complaint were assigned and transferred to the said Casualty Company of America.

Furthering answering said complaint and as a separate defense thereto, said defendant alleges upon information and belief that prior to the commencement of said original action, referred to in the complaint, the Pacific Coast Casualty Company reinsured all the policies that it had written, and thereafter and prior to the commencement of said "Original Action" said Pacific Coast Casualty [76] Company assigned and transferred the securities referred to in the complaint to the Casualty Company of America.

Further answering said complaint and as a separate defense thereto said defendant alleges upon information and belief that prior to the commencement of said "Original Action" No. 320 in Equity, the securities referred to in the complaint in the above-entitled action and all right, title and interest therein were assigned and transferred to the Casualty Company of America, a corporation.

Further answering said complaint and as a separate defense thereto, defendant alleges upon information and belief that at the time of the commencement of said "Original Action" No. 320 in Equity, the Pacific Coast Casualty Company had no right, title or interest in or to any of the securities referred to in the complaint in this action, and had no right to the possession thereof, and the plaintiff

above named acquired no right, title or interest, or right to possession of said securities, or any thereof.

And for a further and separate answer to said complaint said defendant avers that the appointment of plaintiff as receiver of Pacific Coast Casualty Company was void and that this court was without jurisdiction to make such appointment; that on or about the 17th day of November, 1916, Daniel Coombs filed in this court an action against Pacific Coast Casualty Company, a corporation, for the purpose and with the object of having a receiver of said corporation appointed by this Court, and having all the property and assets of said corporation taken into the possession of this court, through the receiver thus to be appointed and said property and assets applied to the payment of all the outstanding debts and liabilities of said corporation.

That this court was without jurisdiction to hear or determine the issues in said action, or any thereof, or to grant the [77] relief therein prayed for or obtained, or any part thereof; that Pacific Coast Casualty Company was at all of the times herein mentioned and now is a bonding and casualty insurance corporation organized and existing under and by virtue of the law of the State of California, and deriving all of its powers from the laws of said State; that in the complaint filed in said action of Daniel Coombs it was alleged that said Pacific Coast Casualty Company was wholly insolvent and unable to meet its debts and liabilities;

That the Insurance Commissioner of the State of California has never certified to the Attorney Gen-

eral of the State of California the fact that said Pacific Coast Casualty Company was or is insolvent; that the Attorney General of the State of California has never commenced an action against said Pacific Coast Casualty Company under the provisions of Chapter 5, Title 10, Part 2 of the Code of Civil Procedure of the State of California, that the said action of Daniel Coombs was not brought under or in accordance with the provisions of Section 604 of the Political Code of the State of California; that the plaintiff herein was in said action appointed receiver by order of this Court and that said order was void and without the jurisdiction of this Court.

X.

Further answering said complaint and as a separate defense thereto, said defendant alleges: That said defendant holds the securities in the complaint as a trustee and to be delivered by him only to the person or persons legally entitled thereto. That numerous persons have made claims and demands upon said defendant for the whole or a portion of said securities and unless said defendant is protected by a valid order, judgment and decree of this Court, said defendant is in jeopardy of contesting conflicting claims and demands in different courts, and unless all of the parties making said claims and demands are brought before this Court, said [78] defendant will not be protected by any order, judgment or decree made herein. That said defendant invokes the aid of this Court to the end that it may bring before it all persons making claims and de-

mands and claiming an interest in said securities or any part thereof, that the claims may be litigated and contested and an order, judgment and decree may be made binding all of the parties making any claim to said securities or any part thereof.

XI.

That heretofore, to wit, on or about the 18th day of September, 1917, one William Gow commenced an action in the Superior Court of the State of California in and for the city and county of San Francisco, applying for a writ of mandamus directed against this defendant and Friend W. Richardson, Treasurer of the State of California, claiming to be entitled to the position of the securities described in plaintiff's complaint demanding that they be delivered to him, and said action is now pending and indisposed of in said court; that the persons named as claimants, in the eighth allegation of this action claim a right to have the trust herein referred to executed in their behalf in the various amounts set opposite their names in said paragraph and will proceed against this defendant upon his official bond for any losses or damages sustained by them in case he should be required to deliver the said securities as prayed for in plaintiff's complaint herein.

That it is necessary and proper to a full and complete determination of the issues of this action that the said William Gow and the persons so serving notices, writs, and stipulations, upon this defendant, or his predecessor in the office of Insurance Commissioner of the State of California, be brought in as parties to this action, and that the process of this

Court be served upon them, so that they may appear, and have their respective claims and demands in and to said securities determined in this action; this [79] defendant claiming no interest in, or to, the said securities as Insurance Commissioner, or otherwise, except that the same shall be delivered over to the person, or persons, entitled thereto.

That this defendant is informed and believes and basing his allegation upon that ground alleges that some, or all, of the persons named in the eighth allegation of this answer were or are policy-holders of the Pacific Coast Casualty Company, and persons for whom the deposit so made as aforesaid are held in trust, and as security for such policy-holders, and that there are other policy-holders of said company likewise interested in said deposit and not parties to said action, and that, therefore, it is not the right or duty of this defendant to release, or consent to the release, of said securities as prayed for in said complaint until the claims and rights of said persons shall have been adjudicated herein.

XII.

That the securities referred to in plaintiff's complaint are held in trust for the benefit of the policy-holders of said Pacific Coast Casualty Company and not otherwise; that as this defendant is informed and believes, and, basing his allegations on that ground, alleges that there are various other claimants against the Pacific Coast Casualty Company who are not policy-holders within the meaning of Section 618 of the Pol. C. of California, and who have claims in various large amounts against said com-

pany; that there are no other assets of said company except such as may remain after the performance of the trust for the policy-holders under which the securities herein referred to are held; that if the securities are required to be delivered over to and are delivered over to the said Receiver expenses of administration and of litigation with relation to the said claims other than the claims of policy-holders will be incurred in an amount so great as to defeat the purposes of said trust and to reduce the [80] amount the policy-holders would receive from the proceeds of said securities in the administration of the trust under which the same are held.

XIII.

Further answering said complaint and as a separate defense thereto, defendant alleges that the above-entitled court has no jurisdiction of the subject of the above-entitled action, or of the parties to said action, and in that behalf alleges that all of the parties to the above-entitled action were at the time of the commencement of said action, and ever since have been and now are, residents and citizens of the State of California.

WHEREFORE, this defendant prays judgment,

1st: that the persons named and referred to in the eighth allegation of this complaint, and any policy-holders of said company interested in said deposit, be brought in as parties to this action and required to set up their claims, if any they have, in and to the said deposit, or any part thereof, and that direction be given this defendant as to what action, if any, he shall take with reference to the writs, no-

tices, demands and stipulations herein and in the complaint in this action set out; and that no judgment be taken against him, and that he be hence dismissed.

And for such other and further relief as shall be just and equitable.

JOHN W. STETSON,
Atty. for Insurance Commissioner.

Service of the within Amended Answer admitted by copy this 6th day of December, 1917.

A. A. DE LIGNE,
HIRAM W. JOHNSON, JR.,
Attorneys for Plaintiff,
REDMAN & ALEXANDER,
Attys. for Defendant Richardson.

[Endorsed]: Filed Dec. 6, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[81]**

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Saturday, the 15th day of December, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 16,079.

JOHN C. LYNCH, as Receiver, etc.,

vs.

FRIEND WILLIAM RICHARDSON, etc., et al.

(Order Denying Motion of Phillips to Intervene, Etc.)

The motion of Jesse S. Phillips, Supt. Ins., etc., for leave to intervene, came on for further hearing and after arguments being submitted and fully considered it was ordered that said motion be and the same is hereby denied. The defendant Richardson by his attorney, Mr. Alexander, moved the Court for an order that William Gow, et als., mentioned in defendant's amended answer be made parties to this action, which motion was denied and to which ruling said defendant duly excepted.

Thereupon this cause came on for trial, Hiram W. Johnson, Jr., and A. A. DeLigne, Esqrs., appearing as attorneys for plaintiff and Jewel Alexander, A. C. Skaife, E. B. Power, Deputy Attorney-General, and John W. Stetson, Esqrs., appearing as attorneys for defendants. The defendant Richardson moved for a continuance of the trial and presented and filed the affidavit of Jewel Alexander in support of said motion; after arguments the motion was submitted. **[82]**

Plaintiff renewed his motion for a judgment as prayed for, on the pleadings as amended and after arguments said motion was continued for further hearing to Dec. 17, 1917. **[83]**

In the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Second Division.

No. 16,079.

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED, That the above-entitled action was commenced on the 1st day of June, 1917, by the filing of the complaint herein; that thereafter and on the 28th day of June, 1917, the defendant Alexander McCabe, as Insurance Commissioner of the State of California, filed his answer herein; that thereafter and on the 2d day of October, 1917, Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his Agent and Liquidator of the Casualty Company of America, a corporation, filed herein a notice of motion for leave to intervene, together with his proposed complaint in intervention; that thereafter and on the 6th day

of October, 1917, said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his Agent and Liquidator of the Casualty Company of America, a corporation, duly served said notice of motion with copy of said proposed complaint in intervention attached thereto upon the plaintiff and each of the defendants herein; that thereafter and on the 11th day of October, [84] 1917, the defendant Friend William Richardson, as Treasurer of the State of California, filed his answer herein; that thereafter and on the 30th day of October, 1917, the defendant Alexander McCabe, as Insurance Commissioner of the State of California, filed his supplemental answer herein; that thereafter and on the 7th day of November, 1917, plaintiff filed herein his notice of motion for judgment on the pleadings; that thereafter and on the 12th day of November, 1917, said Jesse S. Phillips, as such Superintendent of Insurance of the State of New York, filed herein the admission of service of his motion to intervene and proposed complaint in intervention by plaintiff and defendants herein; that thereafter and on the 3d day of December, 1917, said motion of said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, and after continuances duly had and ordered, came on regularly for hearing; said motion was presented to this Court and is based on said notice of motion, said proposed

complaint in intervention duly verified, plaintiff's complaint, the answer and supplemental answer of defendant Alexander McCabe, as such Insurance Commissioner, and the answer of defendant Friend William Richardson, as such Treasurer, by Hartley F. Peart, Esq., attorney for said Jesse S. Phillips, and argument in opposition thereto was made by Hiram W. Johnson, Jr., Esq., and A. A. deLigne, Esq., as attorney for plaintiff, and thereupon said argument was, by order of this Court duly given, made, and entered, continued until the 10th day of December, 1917; that thereafter and on the 6th day of December, 1917, and by leave of the Court first had and obtained the defendant Friend William Richardson, as Treasurer of the State of California, filed herein his amended answer, and on said 6th day of December, 1917, by leave of the Court first had and obtained [85] the defendant Alexander McCabe as Insurance Commissioner of the State of California, filed herein his amended answer; that on said 10th day of December, 1917, said argument in consideration of said motion was by order of this Court duly given, made, and entered, continued until the 15th day of December, 1917, and prior to the trial of said action, when said argument was continued, based upon said pleadings and papers aforesaid, and upon said amended answers of said defendants; that on the 3d day of December, 1917, and at the hearing of the argument on said motion, the defendant Friend William Richardson, as Treasurer of the State of California, stipulated and agreed in open court that the answer of said defendant should

be deemed to admit that the securities referred to in plaintiff's complaint were deposited by the Pacific Coast Casualty Company and were held by said Friend William Richardson as Treasurer of the State of California, under and in accordance with the provisions of Section 618 of the Political Code of the State of California, for the benefit of the policy-holders of said Pacific Coast Casualty Company; that upon said 3d day of December, 1917, said Court granted a motion of said Jesse S. Phillips, as such Superintendent of Insurance, to file a complaint in intervention in the action pending in said court, wherein said John C. Lynch was appointed said Receiver of the said Pacific Coast Casualty Company, and which said lastly-mentioned complaint in intervention is in substance the same as his proposed complaint in intervention herein; that said argument made and based upon said pleadings and papers aforesaid was thereupon concluded upon said 15th day of December, 1917, and taken under consideration by the Court, and the Court thereupon and upon said day and date, gave, made, and entered herein its order denying said motion of said Jesse S. Phillips to file a complaint in intervention herein, which said order is in words and figures as follows, to wit: **[86]**

"The motion of Jesse S. Phillips, Superintendent of Insurance, etc., for leave to intervene came on for further hearing, and, after arguments being submitted and duly considered, it was ordered that said motion be and the same is hereby denied";

To the making of which said order and to which

said order said Jesse S. Phillips, as such Superintendent of Insurance, duly excepted.

(Plaintiff in Intervention's Exception No. 1.)

Now, and in furtherance of justice and that right may be done, the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, presents the foregoing, his bill of exceptions in the said cause, and prays that the same may be settled and allowed and filed and certified by the Judge of the said court, as required by law.

Dated: February 20th, 1918.

HARTLEY F. PEART,

Attorney for Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation.

[87]

IT IS HEREBY STIPULATED by the parties hereto that the foregoing bill of exceptions proposed by Jesse S. Phillips, as Superintendent of Insurance of the State of New York, etc., proposed intervenor herein in said cause, has been prepared, certified, and presented within the time allowed by law and the rules and practice and orders of this Court, and may be settled, allowed and certified by the Judge of said court as a correct bill of exceptions in said cause upon writ of error or other proceeding and filed herein.

And it is further stipulated that said bill of exceptions need not contain any of the pleadings or papers therein mentioned and referred to inasmuch as the same will be incorporated by the Clerk in his certified copy of the record.

Dated this 21st day of February, A. D. 1918.

HIRAM W. JOHNSON, Jr., and
A. A. DE LIGNE,
Attorneys for Plaintiff.
JOHN W. STETSON,
Attorney for Defendant Alexander McCabe, as Insurance Commissioner of the State of California.
U. S. WEBB,
Attorney General.
ALFRED C. SKAIFE,
GUY LE ROY STEVICK,
REDMAN & ALEXANDER,
Attorney for Defendant Friend William Richardson, as Treasurer of the State of California.
HARTLEY F. PEART,
Attorney for Plaintiff in Intervention, Jesse S. Phillips, as Superintendent of the State of New York, etc. **[88]**

Order Approving, Settling, and Allowing Bill of Exceptions.

The above and foregoing was duly presented to me, the Judge of the above-entitled court, within the time allowed by law and the rules and practice of this Court, and the same having been examined by counsel for the respective parties and by the Court,

Now, therefore, I, the Judge of the above-entitled court, before whom the above cause was tried, do hereby approve, sign, settle, and certify the same as a full, true, and correct bill of exceptions herein from the order denying the motion of said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, etc., to file his complaint in intervention herein, and do hereby order the same and the whole thereof to be filed as and made a part of the record in this cause.

And I further certify that said bill of exceptions does hereby refer to all papers and exhibits introduced and offered at the hearing of the said motion for leave to intervene on which the same was heard.

Dated: this 26th day of February, A. D. 1918.

WM. C. VAN FLEET,

Judge of the District Court of the United States.

[Endorsed]: Filed Feb. 26, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[89]**

(Title of Court and Cause.)

Petition for Writ of Error.

Jesse S. Phillips, as Superintendent of Insurance of the State of New York by Moses James Wright, Special Deputy Superintendent of Insurance, his Agent and Liquidator of the Casualty Company of America, a corporation, plaintiff in intervention in the above-entitled cause, feeling himself aggrieved by the judgment of the Court entered herein on the 15th day of December, 1917, denying his motion for

leave to intervene herein, comes now by Hartley F. Peart, Esq., his attorney, and files herewith an assignment of errors in said cause and petitions said Court for an order allowing said plaintiff in intervention to procure a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

And your petitioner will ever pray.

Dated May 10th, 1918.

HARTLEY F. PEART,

Attorney for Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation, Plaintiff in Intervention.

[Endorsed]: Filed May 10, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[90]**

(Title of Court and Cause.)

Assignment of Errors.

Now comes Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his Agent and Liquidator of the Casualty Company of America, a corporation, proposed plaintiff in intervention herein, by his attorney Hartley F. Peart, Esq., and in connection with his

petition for writ of error herein makes the following assignment of errors which he avers were committed by the Court in this cause and in the rendition of the order and judgment herein against said plaintiff in intervention appearing upon the record herein, and upon which he will rely in the prosecution of his said writ of error in the above-entitled cause:

I.

The Court erred in denying the motion of said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, for leave to file his proposed complaint in intervention herein.

II.

The Court erred in giving and making its said order and judgment herein denying the motion of Jesse S. Phillips as such Superintendent of Insurance for leave to file his proposed complaint in intervention herein.

III.

Said motion for leave to intervene herein was seasonably made prior to the trial of the said action and said Jesse S. Phillips as such Superintendent of Insurance, was entitled as a matter of right to intervene in said action as shown by the record herein.

[91]

WHEREFORE, said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of

the Casualty Company of America, a corporation, plaintiff in error, prays that the said order and judgment of the said District Court may be reversed and that said District Court be directed to grant his said motion allowing him to file his said complaint in intervention against the plaintiff and the defendants and the proposed defendants in intervention, and that he be made a party to said action.

Dated May 10th, 1918.

HARTLEY F. PEART,

Attorney for Jesse S. Phillips, as Superintendent of Insurance, etc., Proposed Plaintiff in Intervention and Plaintiff in Error.

[Endorsed]: Filed May 10, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [92]

(Title of Court and Cause.)

Order Allowing Writ of Error and Fixing Amount of Bond.

On the 10th day of May, 1918, came Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, proposed plaintiff in intervention and plaintiff in error, by Hartley F. Peart, Esq., his attorney, and filed herein and presented to this Court, his petition praying for the allowance of a writ of error, and filed and presented therewith his assignment of errors intended to be used by him,

praying also that a transcript of the record, proceedings, and papers, upon which the said order and judgment herein was rendered denying his said motion for leave to intervene herein, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

ON CONSIDERATION WHEREOF, this Court does hereby allow the writ of error and does order that the plaintiff in error shall file with the clerk of this Court a bond with good and sufficient security to the said defendants in error in the sum of Five Hundred (500.00) Dollars to answer all costs if the said plaintiff in error shall fail to sustain his appeal; and it is further ordered that no supersedeas bond need be filed.

Dated this 10th day of May, 1918.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: Filed May 10, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [93]

(Bond on Writ of Error.)

KNOW ALL MEN BY THESE PRESENTS, That we, Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, as principal and National Surety Company, a corporation organized

under the laws of the State of New York, and lawfully transacting business in the Northern District of California, as surety, are held and firmly bound unto John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, in the full and just sum of five hundred and 00/100 (500.00) dollars, to be paid to the said John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of May in the year of our Lord one thousand nine hundred and eighteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Second Division, in a suit depending in said court, between said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidation of the Casualty Company of America, a corporation, proposed plaintiff in intervention, plaintiff in error, and John C. Lynch, as Receiver of the Pacific Coast

Casualty Company, a corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of [94] California, proposed defendants in intervention, defendants in error, a judgment was rendered against the said Jesse S. Phillips, Superintendent of Insurance as aforesaid, and the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California within thirty days from the date thereof; to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as aforesaid, should not be corrected, and why speedy justice should not be done.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent

and liquidator of the Casualty Company of America, a corporation, shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

JESSE S. PHILLIPS,
As Superintendent of Insurance of the State of New York.

By MOSES JAMES WRIGHT,
Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation.

By HARTLEY F. PEART, (Seal)
His Attorney.

NATIONAL SURETY CO.
By FRANK L. GILBERT, (Seal)
Its Attorney in Fact.

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
United States Commissioner North'n Dist. of California. [95]

Form of bond and sufficiency of sureties approved.

WM. H. HUNT,
Judge.

[Endorsed]: Filed May 10, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [96]

(Title of Court and Cause.)

Acceptance of Service of Writ of Error.

The undersigned do hereby each accept on behalf

of the respective parties hereto as hereinbelow stated defendants in error herein, due personal service of the writ of error herein issued on the petition brought therefor by the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, plaintiff in error, this 10th day of May, A. D. 1918.

HIRAM W. JOHNSON, Jr., and
A. A. DE LIGNE,

Attorneys for John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a Corporation, Plaintiff Herein.

U. S. WEBB,
(P)
ALFRED C. SKAIFE,
GUY LE ROY STEVICK,
REDMAN & ALEXANDER,

Attorneys for Friend William Richardson, as Treasurer of the State of California, Defendant Herein.

JOHN W. STETSON,

Attorney for Alexander McCabe, as Insurance Commissioner of the State of California, Defendant Herein.

[Endorsed]: Filed May 14, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [97]

(Title of Court and Cause.)

Acceptance of Service of Citation.

The undersigned do hereby each accept on behalf of the respective parties hereto as hereinbelow stated, defendants in error herein, due personal service of the citation herein issued on the writ of error brought by the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, plaintiff in error, this 10th day of May, A. D. 1918.

HIRAM W. JOHNSON, Jr., and
A. A. DE LIGNE,

Attorneys for John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a Corporation, Plaintiff Herein.

U. S. WEBB,
ALFRED C. SKAIFE,
GUY LE ROY STEVICK,
REDMAN & ALEXANDER,

Attorneys for Friend William Richardson, as Treasurer of the State of California, Defendant Herein.

JOHN W. STETSON,

Attorney for Alexander McCabe, as Insurance Commissioner of the State of California, Defendant Herein.

[Endorsed]: Filed May 14, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [98]

(Title of Court and Cause.)

(Praecipe for Record on Writ of Error.)

To the Clerk of Said Court:

Sir: Please prepare record on writ of error herein to contain the following papers:

The complaint.

Answer of defendant Alexander McCabe, as Insurance Commissioner.

Notice of motion of Jesse S. Phillips, as Supt. of Ins., etc., for leave to intervene, with his proposed complaint in intervention.

Answer of defendant Richardson as Treasurer to complaint.

Supplemental answer of defendant McCabe, as Comm'r.

Plaintiff's notice of motion for judgment on pleadings.

Admission of service on notice of motion to intervene.

Amended answer of defendant Richardson, as Treasurer.

Amended answer of defendant McCabe as Comm'r.

Order denying motion of Phillips as Supt. to intervene.

Bill of exceptions—Stipulation thereto and order allowing and approving and settling same.

Petition of Jesse S. Phillips, as Supt., etc., for writ of error.

Assignment of errors; order allowing writ of error and fixing bond; bond; writ of error; citation

thereon; admission of service of writ of error and of citation.

HARTLEY F. PEART,

Attorney for Jesse S. Phillips, as Superintendent of Insurance, etc. Plaintiff in Intervention, Plaintiff in Error.

[Endorsed]: Filed May 14, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [99]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 16,079.

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, etc., et al.,

Defendants.

Clerk's Certificate to Record on Writ of Error.

I, Walter B. Mailing, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing ninety-nine (99) pages, numbered from 1 to 99, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remains of record and on file in the office of the clerk of said court, and

that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $42.55; that said amount was paid by Hartley F. Peart, Esq., attorney for Jesse S. Phillips, as Superintendent of Insurance, etc., and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of July, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk United States District Court.
By J. A. Schaertzer,
Deputy Clerk. **[100]**

Writ of Error.

UNITED STATES OF AMERICA,—ss,

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Second Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, plaintiff in error, and John C. Lynch as Receiver of the Pacific Coast Casualty Company, a corporation, Friend William

Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, defendants in error, a manifest error hath happened, to the great damage of the said Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the United States, the 10th day of

May, in the year of our Lord one thousand nine hundred and eighteen.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

WM. H. HUNT,
Judge. **[101]**

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,
Clerk U. S. District Court.
By J. A. Schaertzer,
Deputy Clerk U. S. District Court.

[Endorsed]: No. 16,079. United States District Court for the Northern District of California, Second Division. Jesse S. Phillips as Supt., etc., Plaintiff in Error, vs. John C. Lynch as Recr., etc., et al., Defendants in Error. Writ of Error. Filed May

14, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a Corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, his agent and liquidator of the Casualty Company of America, a corporation, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM H. HUNT,

United States Circuit Judge for the Ninth Circuit, this 10th day of May, A. D. 1918.

WM. H. HUNT,
United States Circuit Judge. **[102]**

[Endorsed]: No. 16,079. United States District Court for the Northern District of California, Second Division. Jesse S. Phillips, as Supt. of Ins., etc., Plaintiff in Error, vs. John C. Lynch, as Receiver, etc., et al., Defendants in Error. Citation on Writ of Error. Filed May 14, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3178. United States Circuit Court of Appeals for the Ninth Circuit. Jesse S. Phillips, as Superintendent of Insurance of the State of New York, by Moses James Wright, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the Casualty Company of America, a Corporation, Plaintiff in Error, vs. John C. Lynch, as Receiver of the Pacific Coast Casualty Company, a Corporation, Friend William Richardson, as Treasurer of the State of California, and Alexander McCabe, as Insurance Commissioner of the State of California, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 6, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 16,079.

JOHN C. LYNCH, as Receiver of the Pacific Coast CASUALTY COMPANY, a Corporation,

Plaintiff,

vs.

FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California,

Defendants.

JESSE S. PHILLIPS, as Superintendent of Insurance of the State of New York, by MOSES JAMES WRIGHT, Special Deputy Superintendent of Insurance, His Agent and Liquidator of the CASUALTY COMPANY OF AMERICA, a Corporation, Plaintiff in Intervention,

Plaintiff in Error,

vs.

JOHN C. LYNCH, as Receiver of the PACIFIC COAST CASUALTY COMPANY, a Corporation, FRIEND WILLIAM RICHARDSON, as Treasurer of the State of California, and ALEXANDER McCABE, as Insurance Commissioner of the State of California, Defendants in Intervention,

Defendants in Error.

Order Extending Time in Which to File Record on Writ of Error and Docketing Cause.

GOOD CAUSE APPEARING THEREFOR, it is hereby ordered that the above plaintiff in error may have and he is hereby given to and including the 9th day of July, A. D. 1918, in which to file his record on writ of error and to docket said cause.

Dated this 4th day of June, A. D. 1918.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: No. 16,079. United States District Court, Ninth Judicial Circuit, Northern District California, Second Division, John C. Lynch, as Receiver, etc., Plaintiff, vs. Friend William Richardson, as Treasurer, etc., et al., Defendants. Order Extending Time to File Record on Writ of Error and Docketing Cause.

No. 3178. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including July 9, 1918, to File Record Thereof and to Docket Case. Filed Jun. 4, 1918. F. D. Monckton, Clerk. Refiled Jul. 6, 1918. F. D. Monckton, Clerk.

No. 3179

United States

Circuit Court of Appeals

For the Ninth Circuit.

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

FILED
AUG 19 1913
F. D. MONCKTON,

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3179

United States

Circuit Court of Appeals

For the Ninth Circuit.

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Index.

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff and Defendant in Error,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants and Plaintiffs in Error.

Names and Addresses of Attorneys of Record.

JOHN RUSTGARD, Esq., Juneau, Alaska, Attorney for Plaintiffs in Error.

HELLENTHAL & HELLENTHAL, Juneau, Alaska, Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Complaint.

Comes now the plaintiff and complaining of the defendants, for cause of action alleges:

I.

That the plaintiff is a corporation duly organized and existing, authorized to do, and doing business in the Territory of Alaska; that it has paid its annual license fee last due to the Territory of Alaska and has fully complied with the laws of the Territory of Alaska in regard to corporations.

II.

That the defendants are indebted to the plaintiff upon an open account which has run since October, 1916, to date, on which account the plaintiff has advanced money and merchandise to the defendants in the sum of $17,308 for which sum the defendants agreed to furnish logs or repay [1*] the plaintiff in cash, and on which account the defendants have paid the plaintiff the sum of $15,407.97, all of which payments, except $74.42 made in the fall of 1916, were made in the year 1917.

III.

That there is now due the plaintiff from the defendants the sum of $1,900.03, which sum is wholly unpaid.

WHEREFORE, plaintiff prays judgment against the defendants and each of them in the sum of $1,900.03, together with its costs and disbursements herein incurred.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

*Page-number appearing at foot of page of original certified Transcript of Record.

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is an officer in charge of the plaintiff and as such has personal knowledge in regard to the facts set forth in the complaint; that he has read the foregoing complaint, knows the contents thereof, and the same is true as he verily believes.

H. S. WORTHEN.

Subscribed and sworn to before me this 6th day of September, 1917.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires November 30, 1917.

Filed in the District Court, District of Alaska, First Division. Sep. 6, 1917. J. W. Bell, Clerk. By John T. Reed, Deputy. [2]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Answer.

Come now the defendants above named and answering the plaintiff's complaint herein show to this Court:

I.

As to the allegations set out in Paragraph I of plaintiff's complaint defendants do not have knowledge sufficient to form a belief and therefore deny all of said allegations.

II.

Defendants deny that they or that either of them is indebted to the plaintiff upon an open account or upon any other account either for money or merchandise in the sum of $17,308 or in any other sum whatsoever.

III.

Defendants deny that there is now due plaintiff from defendants the sum of $1,900.03 or any sum whatsoever.

IV.

For a further, separate and affirmative defense defendants allege that they have paid to plaintiff upon the said alleged account referred to in said complaint a sum in excess of [3] $1,517.16, which is in excess of anything of value they have received from plaintiff and plaintiff is now indebted to defendants on said account.

For their first counterclaim against plaintiff, defendants allege:

I.

That between the 1st day of May and the 15th day

of September, 1916, defendants sold and delivered to plaintiff 1,406,190 feet board measure of sawlogs, for which plaintiff agreed to pay defendants at the rate of $6.00 per 1,000 feet board measure, being the total sum of $8,436.94.

II.

That no part of said sum has been paid except the sum of $7,739.74, and that there has been and is due and owing defendants from plaintiff by virtue of said fact since September 15, 1916, the sum of $697.20, together with interest thereon from said last named date.

For a second counterclaim against plaintiff, defendants allege:

I.

That on and between June 24, 1916, and the 16th day of September, 1916, defendants furnished to plaintiff at the latter's instance and request the use of a towboat with crew for periods aggregating 172 hours.

II.

That the same was actually and reasonably worth the sum of $5 per hour, totalling $860.

III.

That no part thereof has been paid, but that the whole thereof with interest since September 16, 1916, is now due and owing defendants. [4]

For a further and third counterclaim against plaintiff, defendants allege:

I.

That on and between March 3, 1917, and August 14, 1917, defendants sold and delivered to plaintiff

2,680,080 feet board measure of sawlogs, for which plaintiff contracted and agreed to pay defendants at the rate of $6.50 per 1,000, amounting in all to $17,015.46.

II.

That no part thereof has been paid except the sum of $16,056, and that there is due and owing thereon the sum of $757.46, with interest thereon since the 14th day of August, 1917.

For a further and fourth counterclaim against plaintiff, defendants allege:

I.

That during the month of July and August, 1917, defendants loaned to plaintiff 72 boom chains and 3 piling chains, which plaintiff agreed either to return to defendants or pay for at their value.

II.

That plaintiff has neglected and refused to return the said chains and that the actual and reasonable value of said boom chains is $3 for each or the total of $216, and the value of the said piling chains is $7.50 for each or the total of $22.50.

III.

That no part of the sum has ever been paid and though there is due and owing defendants from plaintiff by reason of said facts the sum of $238.50.

[5]

For a further and fifth counterclaim against plaintiff, defendants allege:

I.

That on the 15th day of September, A. D. 1916, at plaintiff's special instance and request, and for

its benefit, defendants furnished six workmen for re-booming a raft of logs at Duncan Canal, Alaska, which work continued for a period of nine hours, making a total of fifty-four (54) hours. That the same was actually and reasonably worth and of the value of 50¢ per hour, or a total of $27.00, and that no part of the same has ever been paid.

WHEREFORE defendants demand that plaintiff take nothing by this action, but that defendants have judgment against plaintiff for the sum of $2,580.16, with interest on the sum of $1,584.20 since the 16th day of September, A. D. 1916, and interest on the sum of $757.46 since the 14th day of August, 1917, together with defendants' costs and disbursements herein.

JOHN RUSTGARD,
Attorney for Defendants.

United States of America,
Territory of Alaska,—ss.

Gordon D. McDonald, being first duly sworn, deposes and says: That he is one of the defendants above named; that he has read the foregoing answer and that he believes the same to be true.

GORDON D. McDONALD.

Subscribed and sworn to before me this 5th day of October, A. D. 1917.

[Notarial Seal] JOHN RUSTGARD,
Notary Public for Alaska.

My commission expires September 14, 1918.

Service of the foregoing answer by receipt of copy this 5th day of October, 1917, is hereby admitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Oct. 6, 1917. J. W. Bell, Clerk. By John T. Reed, Deputy. [6]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

R. E. SHENK and GORDAN E. McDONALD, as Copartners, and R. E. SHENK and GORDAN E. McDONALD, as Individuals,

Defendants.

Reply.

Comes now the plaintiff, and for reply to the affirmative matter contained in the answer, denies each and every allegation therein contained, and for reply to first, second, third, fourth and fifth counterclaims, the plaintiff denies each and every allegation in said counterclaims contained.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is the agent of the plaintiff, the Worthen Lumber Mills; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

H. S. WORTHEN.

Subscribed and sworn to before me this 15th day of March, 1918.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Dec. 15, 1921.

Copy received Mch. 12th, 1918.

J. RUSTGARD.

Filed in the District Court, District of Alaska, First Division. Mar. 15, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [7]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Bill of Particulars and Statement of Account.

Comes now the plaintiff and files the following bill of particulars and statement of account in the above-entitled cause:

June 9,	Ch. on a/c.....	$500.00
27,	a/c Stpg.....	1,245.00
"	On a/c	700.00
July 20,	a/c Stpg.....	550.00
Aug. 12,	On a/c	1,500.00
Oct. 12,	"	1,000.00
" 15,	"	1,000.00
" 30,	"	1,000.00
	Stpg.	244.74
	Total debits.....	$7,739.74
	1916a/c.....	74.42
		$7,814.16

1916 a/c

May 2, Ptg. Bay Raft. 148,060 ft.

June 26, Pt. Malsbury Raft. ..... 343,480 ft.

July 25, Pt. Malsbury Raft ..... 397,770 ft.

Sept. 21, Duncan Canal Raft ..... 413,050 ft.

1,302,360 ft. $6.00 $7,814.16

[8]

1916.

Oct. 12,	a/c Stpg.....	$1,050.00
1917.		
Jan. 3,	On ac.	1,200.00
15,	"	500.00
	A/c Stpg.	300.00
Mar. 10,	On a/c	2,000.00
Apr. 11,	"	3,000.00

	20,	"	2,000.00
May	16,	a/c Cable	256.00
	23,	on a/c	1,000.00
	24,	a/c Stpg.	1,000.00
June	15,	on a/c	2,000.00
	28,	a/c Stpg.	300.00
	30,	on a/c	1,500.00
Aug.	14	"	1,000.00
		1 Skiff	25.00
		59 Boom chains 3.00	177.00
		Total debits,	$17,308.00

1917	a/c				
Raft	# 1,	264,783	ft.	$6.50	1,721.09
"	# 2,	246,338	"	"	1,601.20
"	# 3,	211,803	"	"	1,376.72
"	# 4,	170,665	"	"	1,109.33
"	# 5,	209,973	"	"	1,364.82
"	# 6,	252,230	"	"	1,639.50
"	# 7,	270,476	"	"	1,758.09
"	# 8,	198,301	"	"	1,288.96
"	# 9,	225,481	"	"	1,465.63
"	#10,	308,955	"	"	2,008.21
		2,359.005			
		Total credits			$15,333.55
		Dr. bal.			1,974.45
					$17,308.00

$1,974.45
74.42

$1,900.03 Total dr. Bal. [9]

United States of America,
Territory of Alaska,—ss.

H. S. Worthen, being first duly sworn, on oath deposes and says: That he is an agent of the Worthen Lumber Mills, plaintiff in the above-entitled action; that the above is a true and correct statement of account and bill of particulars in the above-entitled cause.

H. S. WORTHEN.

Subscribed and sworn to before me this 15th day of March, 1917.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Dec. 15, 1921.

Filed in the District Court, District of Alaska, First Division. Mar. 16, 1918. J. W. Bell, Clerk. By John T. Reed, Deputy. [10]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD as Individuals,

Defendants.

Bill of Exceptions.

This cause came duly on for trial before the Honorable Robert W. Jennings and a jury of twelve men at the courthouse at Juneau, Alaska, on the 15th day of March, 1918, the jury having been duly empaneled and sworn, and the respective parties having made their opening statement to the jury, Hellenthal & Hellenthal appearing for plaintiff and John Rustgard appearing for defendants, the following proceedings were had:

Testimony of H. S. Worthen, for Plaintiff.

H. S. WORTHEN, being called as a witness on behalf of plaintiff, testified on direct examination as follows:

My name is H. S. Worthen; I am manager and treasurer of the Worthen Lumber Mills, the plaintiff corporation; as such manager of the Worthen Lumber Mills I made a contract with Schenk & McDonald, the defendants, in 1916, and another contract in 1917 for cutting certain logs. The contract for 1916 is dated March 27, 1916, it is signed Schenk & McDonald Logging Company by G. D. McDonald, Manager. I signed one copy of that contract on behalf of the Worthen Lumber Mills and sent that copy to G. D. McDonald. I maintain now that logs were [11] delivered under this contract in 1916. (The contract referred to was offered and received in evidence and marked Plaintiff's Exhibit "A" and the copy hereto attached). The duplicate of this exhibit "A" was signed by myself

(Testimony of H. S. Worthen.)

for Worthen Lumber Mills. The first thing I think that was done under that contract was Mr. McDonald told me he had a little boom of logs at Portage Bay left over from the year before, I think—and wanted to know if I would take them—under the contract—to apply on that contract—and we did. That was the first little boom we got and then after that he decided not to go down to Prince of Wales logging at that time and he said he had some logs at Port Malmsbury that he would like to apply on this contract and I told him we would accept them. I made the remark that if we went down to Port Malmsbury that it was a bad place and I thought it would only be just for him to help us as far as Cape Fanshaw and he said he would do that. We went down to Port Malmsbury and got the first boom and his boat came through to Juneau with that first boom that we got there. He said he was coming here anyway and he thought he might as well keep hooked on. The second boom that we went down to Port Malmsbury to get he started to help us and his boat broke down at Burnt Island and they left us.

I will say that I am quoting from the log of the gas-boat; I was not there. In addition to the logs we received from Portage Bay and Port Malmsbury under that contract, we received in the fall—September—he had some booms down in Duncan Canal and we had one boom [12] from there. Duncan Canal is on the other side of Petersberg. It is this side of Sumner Straits, and under the original contract they were to be cut on the north end of Prince

(Testimony of H. S. Worthen.)

of Wales Island and they would have to come north through the Sumner Straits. Duncan Canal is nearly parallel with Wrangel Straits. I understand that McDonald helped the boys up as far as Cape Fanshaw with the boom from Duncan Canal. The boys went down for the boom and when they came back they reported that McDonald's boat helped them as far as Fanshaw—I think it was.

As far as I was concerned I did not know anything about whether they were going to help them or not. It was a matter for McDonald himself. The Portage Bay raft was 148,060 feet. The first one from Port Malmsbury was 343,480 feet; the second one from Port Malmsbury was 397,770 feet, and the Duncan Canal raft was 413,050 feet. We had a man by name, John Stevenson, who scaled those logs. John Stevenson is not one of our regular men. He owns a fur store down on Front Street—a taxidermist, I think. He has been working at that here. I employed him for the purpose of scaling. I got him to scale those logs. It is his scale of those rafts that I have given you.

Under that contract I paid Schenk and McDonald on June 9, 1916, $500; June 27, we paid stumpage for McDonald, $1,245 and gave him a check for $700; July 20, we paid him $550 on stumpage; August 12, gave him a check for $1,500; October 12, gave him a check for $1,000; November 15, we gave him a check for the second $1,000; November 30, gave him another $1,000, and [13] paid stumpage of $244.74, the total being $7,739.74. These items are the same

(Testimony of H. S. Worthen.)

that are set out in our bill of particulars. The value of the logs delivered under the 1916 contract which I have mentioned would amount to $7,814.16. The first negotiations for the 1917 contract was started some time in the summer of 1916—I don't just remember what part, but I think the first thing that really resulted in anything tangible was, I went down to Portage Bay and met Mr. McDonald and went looking over some timber that we had agreed to take the next year. We did not enter into the written contract until the next January. We paid up the stumpage for this sale so they could go to work before the contract was entered into.

Plaintiff's Exhibit "D" is the contract entered into for the year 1917 on the 4th day of January of that year. It was signed by Schenk and McDonald, by G. D. McDonald. (Plaintiff's Exhibit "D" offered and received in evidence and a copy of which is hereto attached). The payment for stumpage referred to was $1,050 paid October 12, 1916; January 3, we gave him $1,200 on that contract; January 15, $500 and paid $300 for stumpage; March 10, gave him $2,000; April 11, $3,000; April 20, $2,000; May 16, paid for some cable for him; $256; May 23, gave him $1,000; May 24, paid $1,000 stumpage; June 15, gave him $2,000 on account; June 28, paid $300 stumpage; June 30, on account $1,500; August 14, $1,000 and in addition we charged him with a skiff he had for his boat, $25; 59 boom chains at $3 a piece, $177. We delivered the skiff to him and he agreed to pay $25 for it. The whole amount thus paid him under the

(Testimony of H. S. Worthen.)

1917 contract was $17,308. The first boom of logs under that contract came into the mill April 2. It was 264,783 feet; the next boom we received April 11; [14] it was 246,338 feet; the next boom we received April 23, 211,803 feet. May 3, 170,665 feet; May 15, 209,973 feet; May 21, 252,230 feet; June 12, 198,301 feet; June 28, 270,476 feet; June 26, 225,481 feet; July 15, 308,955 feet; it was ten booms in all aggregating 2,358,928 feet; figured at the rate specified in the contract of 1917 those logs would come to $15,333.55.

The rafts and their measurement, together with the payments I have testified to, are the same as set out in the Bill of Particulars. The balance due Worthen Lumber Mills on the two transactions is $1,900.03. I had the logs scaled while they were in the water before they were cut up. They were scaled by the same man, John Stevenson, the same man who scaled the logs in 1916.

On cross-examination, the witness testified:

The contract of 1916 contemplated a purchase of logs from the Government on Prince of Wales Island. That was the talk at the time. We had not made any bid to the Government for logs on the north part of Prince of Wales Island at the time the contract was signed. I don't know what he had done. I don't know whether he had bid or not. He was working down there he told me getting out piling.

Q. As a matter of fact he told you that he had not but he intended to apply for logs at that place when

(Testimony of H. S. Worthen.)

he signed the contract, didn't he?

A. I don't remember him telling me any such thing as that.

Q. Do you remember now having any talk with him at or about the time the 1916 contract was signed about him applying to the Government for logs on Prince of Wales Island?

A. He said that was where he expected to get them. That is why we made [15] the contract that way.

Q. Where were you when you discussed that contract with him?

A. Oh, I think I was here in Juneau.

Q. Was he here on or about the time this contract was signed?

A. I don't think so. I think I mailed him the contract to Petersberg and asked him to sign them and read them and then I signed one and sent it back to him—that is my recollection of it.

Q. Had you talked to him about this sale before the contract was prepared? A. Yes.

Q. Where did you talk to him about it?

A. I think it was here in Juneau—that is my opinion.

Q. How long before the contract was executed?

A. I cannot remember, I am sure.

Q. Couldn't you state approximately?

A. No, I couldn't.

We had bought two or three booms at Portage Bay that he cut out for James in 1916 and this was a little boom of some forty or fifty thousand that was

(Testimony of H. S. Worthen.)

left over from that sale. Personally I have never seen that little boom. I was down there in 1916—went down there personally with the tug boat and got a boom and went up in the timber and looked at the boom he had cut up. We got some in 1916, some timber in the fall of 1916.

I don't know where the logs were out in Duncan Canal, whether it was up at the head or down Beecher Passway. We did not get any logs from Prince of Wales Island in 1916. He would not deliver any logs to us from that place. The only logs which he delivered to us in 1916 were one raft from Portage Bay; two rafts from Port Malmsbury, and one from Duncan Canal. The rafts **[16]** are usually scaled as soon as they come in here to the mill. Sometimes they lay for a month or six weeks and sometimes they are put in the upper bay and lay there three months before they are scaled by my men. I have the record of only one of the rafts scaled in 1916; of the records of the last boom. I did not have the time when the first booms were scaled. There is nothing on the records to show by whom they were scaled—only that I remember it. We have lost records of those three booms. I remember that Stevenson scaled them. We did not always enter the scale in the books as soon as he gave us the scale. I usually kept it in my desk. They were not always entered in the books. The last boom in 1916 was entered at the time it was scaled, September 22d, I think it was. That is the boom from Duncan Canal. One was entered on the books

(Testimony of H. S. Worthen.)

May 2d; another on June 26th, and the third, July 25th. These were the days we gove Schend and McDonald credit for those booms. They must have been scaled before that time. I don't see how they could enter them until they were, but I couldn't swear to that just now. The boom from Duncan Canal was lying at the mill at the time it was scaled by Stevenson. I wasn't out on the boom. I was there at the mill at the time. Referring to the rafts delivered under the contract of 1917, the scale which I have testified to is the scale which Stevenson gave me. I think every raft but one was scaled at the mill. One raft was scaled at the booming ground up here by Price's Point. The days they were scaled are the days given in my testimony already. The days given in the bill of particulars. They are the days copied from the original scale-book. I do not know whether or not these rafts had been scaled by the Government rangers prior to the time Stevenson scaled them. I think there were one or two rafts that came up **[17]** here before they were scaled. I don't know who scaled them. I do not know whether they were scaled here before or after Stevenson scaled them. I think Mr. Babbit scaled them but I didn't see him. He is one of the rangers located at Juneau. My impression is that Mr. Babbit scaled the boom that was put out at Price's Point. If they had been scaled before Stevenson scaled them I would not necessarily have known it. They are supposed to mark them when they scale them but they don't do it—not always. They are

(Testimony of H. S. Worthen.)

supposed to scale them and put their identification mark, the number of the boom and the number of the pieces on the swifter. But this last year it was very seldom that they did that.

We gave McDonald credit both for the spruce and for the hemlock delivered. I furnished Stevenson the calipers used in scaling the logs. I have had them ever since I came to Juneau. I think it is about five years the 26th day of last February since I landed here. Those calipers are now down at the mill office.

Testimony of John R. Stevenson, for Plaintiff.

JOHN R. STEVENSON, called as a witness on behalf of plaintiff, after being duly sworn, testified as follows:

Q. What is your name? A. John Stevenson.

Q. Where do you reside? A. Juneau.

Q. How long have you lived in Juneau?

A. About three years and a half—something like that.

Q. What has been your business since you have been in Juneau?

A. I have worked at the taxidermist trade some.

Q. Have you done anything else besides that?

A. Yes.

Q. What was that? A. Scaling logs.

Q. When did you first start to scale logs, or work in connection with logging? A. 1900. [18]

Q. When did you first begin scaling—how long have you been engaged in that?

(Testimony of John R. Stevenson.)

A. About 18 years.

Q. How long have you followed that as your business? A. Up until the last three years.

Q. It was your business exclusively?

A. Logging and scaling.

Q. Whereabouts did you work at that business?

A. Down on the Sound, Pierce County, King County and Lewis County, Washington.

Q. For whom did you first scale logs, Mr. Stevenson?

A. I first scaled logs for the Junction Mill Company in Puyallup Valley.

Q. In the State of Washington?

A. Yes, in the State of Washington.

Q. How long did you stay with them?

A. I was about four years there.

Q. Where were you after that?

A. I logged for myself.

Q. Where was that?

A. On the Puyallup River.

Q. About how much scaling did you do in the Puyallup Valley for the company you first talked about—about how much scaling?

A. It would be pretty hard to say the amount of scaling that was done.

Q. Did you work at it continuously?

A. Yes, sir; fairly steady; not absolutely doing that altogether but we worked steady cruising and logging.

Q. And then you say you went to work for yourself? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Can you give us any idea how long you worked at this business for yourself, Mr. Stevenson?

A. 14 years.

Q. Logging and scaling and buying?

A. Yes, sir.

Q. Can you give the jury an estimate of how many acres you scaled during that last period?

A. Pretty hard to estimate it.

Q. It would be impossible to do that?

A. Yes, sir. [19]

Q. Did you work at it continuously—or more or less continuously?

A. Well, while I was logging for myself I would be called on to cruise timber here and there for different people, prospective buyers and such as that.

Q. You have done a great deal of that kind of scaling?

A. Yes, cruising; and I have scaled for people, found out how much waste there was, and how much of the log was left, and such as that; also logs that were brought to salt water, for the Tide Water Mill, St. Paul and Tacoma Mill Company, and also for the Fort Layton people.

Q. So you would say you have had at least 16 years experience at scaling? A. Yes, sir.

Q. Did you do any scaling for the Worthen Lumber Mills? A. Yes, sir.

Q. When did you first start to scale for them?

A. I believe it was in 1916.

Q. Do you remember scaling some logs for them that came from Schenk and McDonald that year?

(Testimony of John R. Stevenson.)

A. Yes, sir.

Q. Do you remember scaling a boom of logs that came from Duncan Canal that year? A. Yes, sir.

Q. Or said to have come from Duncan Canal. Have you the scale of that boom of logs?

A. I have the scale of one boom of logs here—I will see what it is. Yes, there is a scale of a boom from Duncan Canal. This one here (indicating). It is the only one I have from that canal.

Q. By what method were they scaled?

A. Well, they was scaled there—

Q. By what rule?

A. Scaled by the Scribner rule.

Q. Prior to scaling that boom of logs were you familiar with a [20] certain contract for logs entered into between McDonald and Schenk and Worthen Lumber Mills?

A. Well, yes, in one way. Mr. Worthen told me that they were not supposed to have any 34 foot logs in the boom, and to scale them as 32.

Q. Have you the scale that you made of the Duncan Canal boom? A. Yes, sir.

Q. Does that scale that you have there correctly represent the scale of the logs in that boom?

A. Yes, sir.

Q. Scaled by you? A. Yes, sir.

The COURT.—Counting 34 foot logs as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—This was under the contract in which they did not count 34 foot logs as 32. He gave him those instructions during one contract,

(Testimony of John R. Stevenson.)

but that was the last contract. The scale speaks for itself. I offer this in evidence.

(Questions by Mr. RUSTGARD.)

Q. Did you prepare this yourself?

A. That was prepared from my scale, right off my book.

Q. By whom? A. By Mr. Worthen.

Q. By Mr. Worthen personally or some clerk of his? A. No, Mr. Worthen personally.

Q. Have you checked it over with your books?

A. We checked it at the time.

Q. Where are your books?

A. That scale was made—

Q. Where is the book you checked it with?

A. I haven't it; I turned that in to Mr. Worthen.

Q. And this is a copy of the book, which you prepared at the time you did the scaling, is that correct?

A. That was taken right from that.

Q. The result you made was in pencil?

A. Yes. [21]

Q. Now, was that put in a little book like the one you have now in your hand?

A. No, that was on a regular scale sheet—loose paper.

Q. And you turned that in to Mr. Worthen?

A. Yes, sir.

Mr. RUSTGARD.—I think it is a copy, your Honor, and I would like to have the original.

Mr. HELLENTHAL.—Mr. Worthen has already testified that the original of this one was lost.

Mr. RUSTGARD.—Not that one.

(Testimony of John R. Stevenson.)

Q. (By Mr. HELLENTHAL.) You compared this with Mr. Worthen? A. Yes, sir.

Q. And you know this to be a correct copy of your original? A. Yes, sir.

Mr. HELLENTHAL.—If you have any further objection I will call Mr. Worthen on it.

Mr. RUSTGARD.—I am willing for you to ask Worthen right there.

Whereupon H. S. Worthen was asked the following questions in regard to said list.

(By Mr. HELLENTHAL.)

Q. Have you the original of this?

A. I cannot find the original sheets—I have hunted all over the office but I couldn't find them. I made that copy at the time and put them in the files.

Q. You compared it with Mr. Stevenson's books?

A. I did; it was correct.

(Questions by Mr. RUSTGARD.)

Q. In comparing it you held the original and he held the copy?

A. I think I held this and he had his original himself. I don't recall just how we did it.

Q. (By Mr. HELLENTHAL.) You know it is a correct copy? [22]

A. I believe it is, yes, sir, to the best of our ability to check it over.

The COURT.—It will be received.

(Whereupon said list was received in evidence and marked Plaintiff's Exhibit "G.") (This exhibit is a typewritten document purporting to be a record of the Stevenson scale of the Duncan raft scaled Sep-

(Testimony of John R. Stevenson.)

tember 23, 1916, giving the length of each log scaled, the gross scale of the logs and the deduction for defects allowed by the scaler. The gross scale aggregates 451,520 feet. The deductions aggregate 38,470 feet; net scale being 413,050 feet.)

Whereupon the direct examination of John R. Stevenson was continued as follows:

Q. (By Mr. HELLENTHAL.) What is the total of the scale of that boom—how many feet of logs was in that boom? A. 413,050.

Q. That correctly represents the number of feet in that boom? A. Yes, sir.

Q. Mr. Stevenson, did you do any scaling for the Worthen Lumber Mills of logs received from Schenk and McDonald during the year 1917? A. Yes, sir.

Q. Have you the scale of the first boom that you scaled during that year? A. Yes, sir.

Q. Does that correctly represent the number of feet of logs in that boom? A. Yes, sir.

Q. How many board feet—were they measured according to the Scribner rule? A. Yes, sir.

Q. How were 34 foot logs counted—how were they measured?

A. I am confused on these two contracts. I will say I was not informed in regard to those 34 foot logs until later on.

Q. The second contract, the 1917 contract, you were informed [23] that 34 foot logs should be scaled as 32 feet? A. Yes.

Q. And the 34 foot logs in this boom were scaled as 32 foot logs? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. How many feet were there in the first boom that you scaled?

A. I didn't figure these up to the exact amount there was in the boom. These are not figured up by me.

Q. But the original figures—

A. The original figures of the scale are mine.

Q. What is the total of them?

Mr. RUSTGARD.—He says he has not figured it out.

Mr. HELLENTHAL.—The whole amount is there—it would be only a matter of calculation. He testifies he hasn't added it up.

The COURT.—Put the book in and let the calculation be made.

The WITNESS.—This addition is by someone else.

Q. How many pages does the scale of the first boom cover? A. 264,783 feet.

Q. Are the pages numbered in the book?

A. No—about 10 pages.

Mr. HELLENTHAL.—I now offer the first 9 pages of this book as being the scale of boom No. 1, made by Mr. Stevenson.

Mr. RUSTGARD.—No objection.

(Whereupon the first 9 pages of the said book were received in evidence and marked Plaintiff's Exhibit "H.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 276,508 feet.

(Testimony of John R. Stevenson.)

The deductions aggregate 11,725 feet for the raft; the net scale of the raft as shown by this exhibit is 264,783 feet.)

Q. Did you scale another boom for the Worthen Lumber Mills that came from Schenk and McDonald? A. Yes, sir. [24]

Q. And they were correctly scaled, were they?

A. Yes, sir.

Q. And that scale is accurately given in your scale-book? A. Yes, sir.

Q. What pages does that cover, from pages 10 to 17? A. Yes, sir.

Q. Inclusive? A. Yes, sir.

Q. And does that accurately represent the scale of the second boom of logs received by the Worthen Lumber Mills from Schenk and McDonald in 1917?

A. Yes, sir.

Q. What is the total in board feet?

A. 246,338.

Q. You didn't add up those figures yourself?

A. No.

Mr. HELLENTHAL.—I ask that those pages from 10 to 17 inclusive be received in evidence.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "I.") (This exhibit purports to be detailed record of scale showing length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of this raft as shown by this exhibit is 254,029 feet; the net scale of the raft is 246,338 feet.)

(Testimony of John R. Stevenson.)

Q. Did you scale any other logs for the Worthen Lumber Mills received from Schenk and McDonald?

A. Yes, sir.

Q. You scaled a third boom? A. Yes, sir.

Q. Do pages 18 to 25 correctly represent the scale of the third boom of logs received by the Worthen Lumber Mills from Schenk and McDonald during the year 1917? A. Yes, sir.

Q. What is the total board feet of that third boom?

A. 211,803.

Q. What was scaled by you? A. Yes, sir.

Q. In the same method as the previous boom?

A. Yes, sir.

Mr. HELLENTHAL.—I now offer pages 18 to 25 inclusive, and ask that it be marked Exhibit "J."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "J.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 217,641 feet; [25] deductions 5,838 feet; net scale 211,803 feet.)

Q. I now direct your attention to pages 26 to 31 inclusive of your scale-book and ask you what that represents?

A. Another boom from Schenk and McDonald from Portage Bay.

Q. Is that the fourth boom? A. Yes, sir.

Q. Received by the Worthen Lumber Mills?

A. Yes, sir.

Q. Scaled by you? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Do those pages correctly represent the scale of the logs of that boom as made by you?

A. Yes, sir.

Q. What was the number of board feet in that boom? A. 170,665.

Q. They were scaled by you as previously stated, by the Scribner log rule? A. Yes, sir.

Q. Scaling 34 foot logs as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—I offer pages 26 to 31 inclusive of the scale-book in evidence and ask that it be marked exhibit "K."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "K.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 179,983 feet; deductions, 9,318 feet; net scale 170,665 feet.)

Q. I now direct your attention to part of your scale-book commencing on page 32 and ending with page 37, and ask you what that is—what that represents?

A. A boom of logs from Schenk and McDonald.

Q. Was that received by the Worthen Lumber Mills? A. Yes, sir.

Q. Boom No. 5? A. Yes, sir, raft 5.

Q. Do those pages contain a correct scale of the logs in boom No. 5 as made by you?

A. Yes, sir. [26]

(Testimony of John R. Stevenson.)

Q. That scale was made by you with a Scribner rule? A. Yes, sir.

Q. According to the Scribner method?

A. Yes, sir.

Q. Thirty-four foot logs were scaled as 32 feet?

A. Yes, sir; on this scale.

Q. And what is the total amount in board feet in that boom? A. 209,973.

Mr. HELLENTHAL.—I ask that those pages, beginning at page 32 and ending at page 37 be received in evidence and marked Plaintiff's Exhibit "L."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "L.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 221,960 feet; deductions, 11,987 feet; net scale 209,973 feet.)

Q. I now direct your attention to that section of your scale-book commencing at page 38 and ending on page 45, and ask you what that represents?

A. A raft of logs from Schenk and McDonald.

Q. That is No. 6 raft? A. Yes.

Q. Do those pages of your scale-book just referred to represent the accurate scale of the logs in that boom as scaled by you? A. Yes, sir.

Q. Were the logs scaled with the Scribner rule?

A. Yes, sir.

Q. According to the Scribner method?

A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. And were 34 foot logs scaled as 32 foot logs?

A. Yes, sir.

Q. And what was the total number of board feet contained in that boom?

A. This sum total here is kind of funny—I didn't do this addition myself.

Q. You cannot read it?

A. Yes, I can read it but just what that [27] is is not plain to me.

Mr. HELLENTHAL.—I now offer in evidence that section of the scale-book commencing on page 38 and ending with page 45, and ask that it be marked Plaintiff's Exhibit "M."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "M.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 259,918 feet; deductions, 7,688 feet; net scale, 252,230 feet.)

Q. Now, I direct your attention to that portion of your scale-book commencing with page 46 and ending with page 50, and ask you what is contained in those pages?

A. A raft of logs from Schenk and McDonald.

Q. Is that the sixth raft?

A. I think it is the seventh.

Q. It is a raft of logs received from Schenk and McDonald by Worthen Lumber Mills in the year 1917? A. Yes, sir.

Q. Does that scale contain a correct scale of that

(Testimony of John R. Stevenson.)

boom of logs made by you? A. Yes, sir.

Q. And that was made with a Scribner rule?

A. Yes, sir.

Q. Thirty-four foot logs scaled as 32 feet?

A. Yes, sir.

Mr. HELLENTHAL.—I now offer that portion of the scale-book commencing with page 46 and ending with page 50, both inclusive, in evidence and ask that it be marked exhibit "N."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "N.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale [28] of the raft referred to is 211,285 feet; deductions 12,984 feet; net 198,301 feet.)

Q. I now direct your attention to that part of your scale-book commencing on page 51 of your scale-book and ending in the middle of page 57, purporting to be a boom of logs received from Schenk and McDonald on June 28, 1917, and ask you if that is a scale made by you?

A. Yes, sir; this scale was made by me.

Q. Does it correctly represent the number of feet in the boom? A. Yes, sir.

Q. Scaled by Scribner rule? A. Yes, sir.

Q. Thirty-four foot logs scaled as 32 feet?

A. Yes, sir.

Q. What is the number of feet in that boom?

A. The sum total here would be 198,301.

Mr. HELLENTHAL.—I now offer pages 51 to the

(Testimony of John R. Stevenson.)

middle of page 57, inclusive, of the scale-book, and ask that it be marked Plaintiff's Exhibit "O."

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "O.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 241,655 feet; deductions 16,174 feet; net 225,481 feet.)

Q. I now direct your attention to that portion of your scale-book commencing in the middle of page 57 and running to 65 inclusive, which purports to be the scale of a boom of logs, boom No. 7, of Schenk and McDonald, and ask you if that [29] represents the scale made by you of that boom?

A. Yes, sir.

Q. Does that correctly represent the number of feet in that boom? A. Yes, sir.

Q. Made by the Scribner rule? A. Yes, sir.

Q. Thirty-four foot logs counted as 32 feet?

A. Yes, sir.

Q. How many board feet were there in that boom?

A. 270,476.

Mr. HELLENTHAL.—I now offer that portion of the scale-book, commencing in the middle of page 57 and ending on page 65, inclusive, and ask that it be marked Plaintiff's Exhibit "P."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "P.") (This exhibit purports to show the length of each log scaled,

(Testimony of John R. Stevenson.)

the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 281,168 feet; deductions 10,692 feet; net 270,476.)

Q. I now direct your attention to that portion of your scale-book commencing on page 66 and continuing on to page 74, inclusive, which purports to contain the scale of a boom of logs received by the Worthen Lumber Mills from Schenk and McDonald.

A. Yes, sir.

Q. Was that scale made by you? A. Yes, sir.

Q. Does that correctly represent the logs and number of feet in that boom? A. Yes, sir.

Q. What is the total number of feet in that boom?

A. 308,955.

Q. That scale was made by you? A. Yes, sir.

Q. It was made by the Scribner rule?

A. Yes, sir.

Q. Thirty-four foot logs were scaled as 32 feet?

A. Yes, sir.

Q. Do the scales that have been previously introduced in evidence, made by you, do they show the gross scale of the logs, [30] the number of feet contained in each log? A. Yes, sir.

Q. Do they also show the discounts?

A. Yes, sir.

Q. How are the discounts indicated?

A. Indicated by a mark—1 for a discount of 10 off; 2 for a discount of 1/5; 3 for 1/3 and 4 for 1/4, and a half is considered a cull. That is the way it is

(Testimony of John R. Stevenson.)

marked in this book—that is my system of marking off defects.

Q. Is there any indication in that book which explains that system, in the front part of that book?

A. Yes, it is marked here in the front part so it could be understood by anyone who looked at it.

Mr. HELLENTHAL.—I now offer that portion of the scale-book from page 66 to page 74 inclusive, and ask that it be marked Plaintiff's Exhibit "Q."

Mr. RUSTGARD.—No objection.

(Whereupon said pages were received in evidence and marked Plaintiff's Exhibit "Q.") (This exhibit purports to show the length of each log scaled, the gross scale of each log and the deductions for defects allowed by the scaler. The gross scale of the raft referred to is 326,585 feet; deductions 77,630 feet; net 308,955 feet.

Q. Now, all these scales contained in this book have all been made by you according to the same methods?

A. Yes, sir.

Q. Using the Scribner rule? A. Yes, sir.

Q. And scaling 34 foot logs as 32 feet?

A. Yes, sir.

Q. You also made the scale of the booms the year before? A. Yes, sir.

Q. The four booms? A. Yes, sir.

Mr. HELLENTHAL.—You may cross-examine.

[31]

Cross-examination.

(By Mr. RUSTGARD.)

Q. Mr. Stevenson, you testified as a witness for

(Testimony of John R. Stevenson.)

Mr. Worthen or the Worthen Lumber Mills at the time of the injunction proceedings last summer or fall? A. I believe I did.

Q. You had this book with you at that time?

A. I think so.

Q. Have you made any changes in the book since that time? A. No, sir.

Q. What time did you make these writings in ink signing your name?

A. At the time I done the scaling. I signed the book whenever I brought it into the office, I signed up for that boom and signed my name to it.

Q. Now, was anybody with you at the time you did the scaling? A. Sometimes there would be.

Q. Do you remember now who was with you at any particular time when you scaled?

A. Yes, I used to get a fellow to mark for me.

Q. What do you mean by marking?

A. Set down the figures.

Q. To write down in this book here what you told him? A. Yes.

Q. Who was that?

A. I had a boy by the name of Allen Fortney to do some of that.

Q. Where is he now?

A. He is going to school here; he is in town.

Q. These figures put down in this book, they are not actually yours? A. Not all of them, no.

Q. How large a percentage do you think are yours?

A. Well, there are not a great deal of them mine in that.

(Testimony of John R. Stevenson.)

Q. You always had a boy to do the writing for you?

A. Sometimes a boy or some other man I could get to take figures for me.

Q. Who furnished the boy or the man?

A. I generally got him *himself*. [32]

Q. Who paid him? A. I paid him myself.

Q. You couldn't say now which are your figures and which are somebody else's figures in this book?

A. Yes, I can tell my own figures.

Q. Is that anything to show here into how many logs you divided a stick? A. Yes, it shows there.

Q. Explain to the jury how that is shown.

A. Where we scaled a long log—say it was long enough to be scaled three times—if it was a 60 foot log and we scaled it into three twenties, we designated the three logs by making a little curve and putting the three in a little half moon we made there to designate it was a long stick scaled three times; we would put down the figures of the three scales, and then we would draw a little half circle or moon to show that that was one long stick.

Q. In the third column counting to the right occasionally occurs a figure such as 2 or 3 or 4—

A. Yes.

Q. These are the figures which you testified show how much you discounted? A. Yes.

Q. Now, you have, for instance, in the second column from the left the figure 680, the third column marked 2—what does that indicate?

A. That indicates the log was rotten and we docked it 1/5.

(Testimony of John R. Stevenson.)

Q. And the figure you have put down in the second column is the figure you got after making the deduction of the cull?

A. No, this is the full sum total scaled, and that has to be deducted from it, Mr. Rustgard.

Q. The figure in the second column is the full measurement of the log? A. Yes, sir.

Q. Without any deduction? A. Yes, sir. [33]

Q. Now, then, who carried out the deductions?

A. I don't know.

Q. Now, these figures which you have given there as the sum total, is that the sum total of each raft after your deduction is taken away, or is it the sum total of the measurements?

A. I didn't add those up, and I don't know, Mr. Rustgard, whether the deductions were made or whether it is the sum total.

Q. Now, where was the first raft lying—the one from Duncan Canal which you claim to have scaled in September, 1916—when you scaled it?

A. Those rafts—I think that raft was lying at the mill when it was scaled.

Q. Do you know whether it was or not?

A. Yes, positive of it.

Q. Was Worthen there at the time it was scaled?

A. I don't know as he was on the boom, but he was around the place there somewhere.

Q. You have a clear recollection that he was around the place? A. Yes.

Q. Do you know how long after the boom got into the mill before it was scaled?

(Testimony of John R. Stevenson.)

A. I would say within a few days, because I don't know just when the boom did come into the mill, but it couldn't have been but a few days.

Q. Was it at the log pond when you scaled it?

A. No, it was right at the mill in the usual boom ground there.

Q. Outside of the log pond? A. Yes.

Q. Do you remember where the boom was which was the first one in 1917 that you scaled?

A. The first I scaled was laying right at the boom ground outside of another boom that was there.

Q. Outside of another boom?

A. Outside of some other logs; I don't know whether it was a full boom or not. [34]

Q. Do you know how long that had been there before you scaled it?

A. I don't think it was over a day or two.

Q. How do you know it came from Schenk and McDonald? A. I don't know.

Q. You don't know? A. I don't know.

Q. Where was the second boom you scaled in 1917 when you scaled it?

A. It was laying in the same place.

Q. How do you know that came from Schenk and McDonald? A. I don't know it.

Q. Do you remember where the third boom was when you scaled it in 1917? A. Yes.

Q. Where was that?

A. It was up the bay here tied to some pilings up in the log pond here.

Q. Who was with you when that was scaled?

(Testimony of John R. Stevenson.)

A. Oh, I had Allen Fortney to mark the figures for me on that boom.

Q. How long had that been there before you scaled it?

A. Well, I don't know how long it had been there.

Q. How do you know that came from Schenk and McDonald?

A. I couldn't swear that it did.

Q. Do you remember where the fourth boom was when you scaled it?

A. That would make the fourth boom.

Q. Where was the fifth one?

A. The fifth one was down at the mill.

Q. Do you know how long that had been there before you scaled it?

A. Well, it had not been there very long.

Q. How do you know that came from Schenk and McDonald?

A. Nothing only what they would tell me and what marks I could see.

Q. What marks did you see?

A. Well, the mark on it wouldn't particularly designate anything only the ranger's mark there down in that country. **[35]**

Q. What ranger mark did you see on that?

A. Well, I don't know as I have got any of them in the book there. It was some marks cut on them once in a while that a person would notice. I don't know that I have got any of the marks of this scale.

Q. The same is true of the other booms—you don't know who they came from? A. No.

(Testimony of John R. Stevenson.)

Q. Now, what time was it that you made that copy of your scale of the Duncan Canal boom?

A. That was only a day or two, or two or three days after we had scaled the boom.

Q. How did you happen to make that in typewriting?

A. Well, Mr. Worthen called me in and asked me something about some big logs that were in the boom—he said, "I see your scale represents some big logs in the boom that must be bad," and we were talking about it, and we went to work on that and made a copy of it, and he asked me to go over it with him.

Q. He said you must have made a mistake—that you counted some big ones that were too bad, is that right?

A. He didn't say anything about any mistake, but he asked me what kind of a boom it was; he said my scale showed there must be some big bad logs in it.

Q. How did that show in your scale?

A. Showed just the same as that there (indicating).

Q. How does that show there are some big bad logs?

A. Well, if you notice here, some of them are marked culls.

Q. There is a figure 26, to the right of which is marked 4—what does that mean—26 feet thrown out?

A. That means a cull log or a log that is absolutely no good.

(Testimony of John R. Stevenson.)

Q. What does the 26 stand for?

A. The scale of that log. **[36]**

Q. It scaled 26 as good—in other words if you counted it good it would count 26 feet?

A. No, if I scaled a log I would put down the full scale, and then if a log is absolutely worthless it would be marked a cull, but the full scale is put down always.

Q. Now, will you tell the Court what that figure 26 stands for?

A. If you will add a cipher there, as the Government does, that will be 260 feet.

Q. What does the 260 feet stand for—is it the measurement of the log, or what is left after throwing out some cull?

A. No, it is the full scale of the log—what lumber would be in the full scale of the log, and that log being rotten would be called a cull.

Q. Entirely? A. Entirely—it is worthless.

Q. So those figures to the immediate left of the word "cull," in your exhibit "G," should not be counted in adding up the total scale of that raft?

A. No, they should not.

Q. They should be thrown out?

A. They should be thrown out.

Q. In adding up that raft did you throw it out?

A. I didn't add up the raft myself; it was done on the adding machine.

Q. You say there should be a cipher added to those figures to the left of the word cull?

(Testimony of John R. Stevenson.)

A. There is always a cipher left off on a Government scale-stick.

Q. Did you use the Government scale-stick there?

A. Scribner scale.

Q. Do you always leave off that last cipher yourself? A. No, I always add it.

Q. Why did you leave it off here?

A. That was a matter of keeping it straight. Here on the scale-stick this cipher is not on the scale-stick—if it is 260 the cipher is not on it, and it leaves off that decimal; but I always add it on my books **[37]** because it kept me more straight in putting down my figures and keeping them right.

Q. If your scale-stick leaves off that last cipher isn't it just exactly the same as the Government scale-stick in that respect? A. Yes.

Q. That is what is called the "decimal C. scale," isn't it?

A. I don't know what you call it, but that is the way the scale-stick reads.

Q. Where, for instance, at the top of the fourth column from the left there is a figure 120, that should be, if written in full, 1200, is that correct?

A. Yes, sir.

Q. And the system of dropping the last figure is adopted for convenience sake? A. Yes, sir.

Q. And your scale-stick drops it? A. Yes, sir.

Q. I call your attention to a column, the top of which is marked "Waste" and a certain figure—for instance, 19, 6, 3, 6, 41—what does that stand for?

A. I know what 19 stands for in some places.

(Testimony of John R. Stevenson.)

Q. You knew at one time. You knew what 19 stood for at the time you put it there?

A. No, I didn't put it there.

Q. Who do you think put it there. Wasn't it on the original sheet from which you made this copy?

A. No, I took the figures from the original sheet, and what deductions and culls there was.

Q. That is not an exact copy of the original sheet, then?

A. It is so far as the lengths and diameters and scales are concerned.

Q. Where are the diameters shown?

A. Here is the length of the log (indicating). [38]

Q. The length of the log is shown in the first column to the left, and the full scale is shown in the second column from the left—is that corect?

A. This would be shown on the left and this on the right there.

Q. Now, then, the diameter is not shown at all, is it? A. No.

Q. Was it shown on the original sheet?

A. No, it wasn't shown on that.

Q. Now, in the column, at the top of each is marked "Length" and "Gross," and there are various figures such as 22, 38, 12, 30, 46—what do they stand for?

A. I don't know—I don't know what those figures stand for. All I do know is that we took the length and the amount of logs from the original sheet, but what those are for I don't know—but these diam-

(Testimony of John R. Stevenson.)

eters and scale was taken from the original sheet.

Q. Do you know what is the difference between a Scribner and a Decimal C? A. No, I don't.

Q. Have you seen the Decimal C.

A. No, I don't know as I ever used that scale.

Q. Have you ever used Scribner's?

A. Yes, sir.

Q. Is that a Scribner you have been using?

A. Yes, sir.

Q. That is the one furnished you by Worthen?

A. Yes, sir.

Q. You are sure that is not a Decimal C?

A. Well, it is just like all Scribner sticks I ever used before.

Q. Your are not the owner of a pair of calipers yourself? A. No, sir.

Q. Now, Mr. Stevenson, you have been working with lumber a good while and you are able to judge the distance of a stick, the length of a stick without measuring it, pretty well, aren't you?

A. Oh, yes, sometimes. [39]

Q. You feel pretty safe in judging the length without measuring it, don't you?

A. Not always. It is a good plan to measure them.

Q. In measuring these logs did you always lay them off into the number of sticks which you have testified to and which you scaled with a rule?

A. I measured them, every one.

Q. You measured with a stick? A. Yes.

Q. You didn't just step them off?

(Testimony of John R. Stevenson.)

A. Oh, no, no.

Q. Didn't you exercise your judgment and determine by looking at it how far it would be down to the next place? A. No, sir.

Q. Never? A. No, sir.

Q. You didn't take your book and open it every time and put the stick down, did you?

A. I did; I measured it with an 8-foot stick.

Q. And when you came to the proper place did you always put on the calipers? A. I think I did.

Q. On the Sound you followed the custom of measuring the top of the stick, didn't you, as a rule, and then estimating the place at the other places where the log was supposed to be cut?

A. We would estimate at the end if we couldn't get to it—if the end was in bad water we would do that, but that wasn't the case here. I could always get on to the sticks and "calip" them.

Q. You scaled a good many other rafts besides those you have testified to here? A. I think so.

Q. You were kept pretty busy scaling for Worthen? A. No, not usually very busy.

Q. You scaled every one he got to his mill, as far as you know?

A. I think I did—I don't know as I did, but I think I did. [40]

Q. He got rafts from a good many other loggers?

A. Yes.

Q. And as far as you know you scaled them all?

A. I may have.

Q. Have you scaled logs for anybody else here?

(Testimony of John R. Stevenson.)

A. I have scaled some logs for people who have brought them in that has come up to get me to scale them.

Q. Who were they?

A. I don't know their names.

Q. How long is that since?

A. That was some time last summer or last fall.

Q. How many logs were there?

A. I think I scaled a couple of other booms of logs for parties.

Q. Who were they?

A. I couldn't tell you their names.

Q. Where were those booms brought to?

A. The booms at the time were tied up down here at Mr. Worthen's place.

Q. Who asked you to scale those?

A. I cannot remember his name—in fact, I wouldn't remember his name if he had told me.

Q. Last fall?

A. Yes, I think there was one last fall and another along in the summer, if I remember it right.

Q. They were logs that were sold to Worthen?

A. I don't know that they were.

Q. They were at his mill?

A. They were tied up there.

Q. Do you know now where those calipers are which you have been using doing this scaling?

A. No, I don't.

Q. Whose calipers did you use when you scaled the booms belonging to the other people?

A. I used Mr. Worthen's calipers.

(Testimony of John R. Stevenson.)

Q. What is your occupation, Mr. Stevenson, at the present time?

A. Why, I have been a taxidermist here in town.

Q. How long have you been working for Worthen?

A. I have not been working for Worthen very much—I drove a few piling down there on the dock this winter for a few days.

Q. You were watchman for him last winter at the mill? [41] A. Yes, for a little while.

Q. And you are working for him now, aren't you?

A. No.

Q. When did you quit?

A. Oh, I haven't been working for him—I haven't done anything down at his place for over a month, I guess—something like that.

Q. Whenever there is anything to be done at the mill you are called in to help do it?

A. Not necessarily.

Q. Not necessarily I know, but what work has been done there has been done by yourself this winter, hasn't it? A. Oh, no.

Q. By others? How much of the time have you worked for Worthen this winter?

A. Oh, probably 15 or 20 days, something like that.

Q. How long were you watchman?

A. Last summer.

Q. How long?

A. I think that was something like 28 days, maybe.

Q. You testified about your experience as a scaler, now, you said that you were scaling for the Junction Mill four years—was that the only thing you did for

(Testimony of John R. Stevenson.)

them, scaled? A. Well, pretty near.

Q. Now, how much of the four years did you spend scaling for them?

A. You see, they had a log contract with a party that they had to have the logs scaled on the land, and the man had to be on the job all the time to scale those logs when they came on to the mill landing.

Q. Who else scaled there with you?

A. They had no other scaler but me when I was there.

Q. How long have you been in Alaska?

A. About three years and a half.

Q. Have you done any other logging or scaling in Alaska except what you have testified to here?

A. No. [42]

Q. You said something about scaling 34 foot logs as 32 feet—do you know how many 34-foot logs you found in these rafts? A. No, I do not.

Q. Do you remember finding any. A. I do.

Q. In what rafts?

A. I don't know as I could tell you what raft, but I remember of finding some of those logs. I think some of them are designated in the book—I ain't sure.

Q. Do you think you could find them?

A. I think I can, if my memory serves me right.

Q. You noted separately what you threw off for the extra 2 feet?

A. Yes, they were scaled as 32 feet logs—any 34 foot ones.

Q. All right, look at the record and see if you can

(Testimony of John R. Stevenson.)

find any 34-foot log which scaled at 32.

A. Well, here is one; if you can go by my way of knowing I will show you one; right there is a 34 foot. Anything marked 32 with an X behind it is a 34 cut down to 32 feet, by my way of knowing.

Q. Very well. In this scale-book which is in evidence wherever there is a log marked with the length 32 feet, and you put an X in front of it—

A. X behind it.

Q. I call that in front of it, but it is all right—it is on the left of the figure? A. Yes.

Q. That indicates that it was a 34 foot log?

A. Yes, sir.

Q. Have you any way of estimating how much was thrown off, or how much the two feet thrown off amounted to in board measure?

A. You could get it by looking at the scale of the 34-foot logs, because here is your diameter and your length; and then if it was a 34-foot log would give you the correct scale of the log.

Q. Very well. Take on page 15, the second column from the right, there is a figure 32 with an X to the immediate left of it—what is the diameter of that log?

A. I couldn't tell you [43] the diameter of that log until I looked at the stick.

Q. Could you figure up from your records how much was thrown off from these rafts by reason of some logs being 34 feet long?

A. I think they would be shown in this book, the logs that were 34 feet.

(Testimony of John R. Stevenson.)

Q. Can you, by the use of that book, figure out how much has been thrown off from each raft by reason of counting 34 foot logs as 32 feet?

A. I could.

Q. I will ask you again these questions. Wherever the figure one occurs to the immediate right of the scale, that stands for a deduction of 1/10th?

A. Yes, sir.

Q. And wherever the figure 2 occurs, that represents a deduction of 2/10ths? A. 1/5th.

Q. That is the same thing; and 3 represents how much? A. A third.

Q. And 4? A. Deducts a fourth.

Q. When one-half is to be deducted how is that represented?

A. I always call a log that is half rotten or spoiled a cull.

Q. And you marked it as such? A. Yes, sir.

Q. And you would indicate that in the scale?

A. Yes, and mark it a cull.

Mr. RUSTGARD.—That is all.

(Whereupon court adjourned until 9:30 to-morrow morning.)

MORNING SESSION.

March 16, 1918, 9:30 A. M.

JOHN R. STEVENSON, upon being recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Stevenson, you have been asked on cross-

(Testimony of John R. Stevenson.)

examination as to whether you worked as watchman for the Worthen Lumber Mills? **[44]**

A. Yes, sir.

Q. Was that before or after these scales were made? A. It was before that.

Q. What did you do first, the scaling or the watching?

A. The scaling was done first. I haven't done any scaling since I was watchman there.

Q. Had you done anything for the Worthen Lumber Mills except scaling before these scales were completed?

A. Yes, I had; I had worked down on the pier for Mr. Worthen sometimes.

Q. When was that?

A. I couldn't tell you when it was, but it was some little work on the pier there.

Q. You were never regularly employed by Mr. Worthen? A. No, sir.

Q. Before that? A. No, sir.

Q. Nor since that time? A. No, sir.

Q. And in making these scales, did you have any interest in the scale, whether it was made large or small?

A. No, sir; none whatsoever.

Mr. HELLENTHAL.—That is all.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You testified, Mr. Stevenson, that where you scaled a log that was 34 feet long as a 32 foot log,

(Testimony of John R. Stevenson.)

that you put a cross to the immediate left of the figure? A. Yes.

Q. Now, did you put any crosses to the immediate left of any other figures than those logs you so scaled?

A. All the time—any single logs.

Q. Whenever timber was so short that you scaled it as one stick, you put a cross in front of it?

A. Yes, sir.

Q. So that these crosses to the immediate left of these figures would indicate that it was just one stick? A. Yes, sir. [45]

Q. It does not necessarily indicate that it was 34 feet long?

A. If you notice in running through that book you will find a cross and a V behind it.

Q. What does that mean?

A. That would be an exact 32.

Q. Find one of them for me. I suggest you step down to the jury so that they will have a chance to see the method you are talking about keeping in that book.

A. Here is what I was speaking about. (Indicating.) You see this here—see I made a mark here and a V there.

Q. Now, while you have the book here, the column to the left indicates the length of the log as scaled, and the second column from the left indicates the scale? A. Yes, sir.

Q. These figures where you have a cross in front, or immediately to the left, indicate a single log?

A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. Now, yesterday on cross-examination didn't you testify that the way in which you identified the 34 foot logs which you scaled as 32 feet, was by the cross in front or immediately to the left—did you so testify?

A. Yes, and my explanation of that, they would have to be traced by the scale-stick.

Q. Now, didn't you, in response to my question as to how you identified the logs which were 34 feet and which you scaled as 32, state that it was by the cross in front? A. Yes, sir.

Q. Now, you admit, do you not, that all the single logs have a cross in front?

A. With the exception—I want to get a chance to explain my whole theory of keeping it.

Q. Didn't I ask you to explain to the jury how you identified them, and didn't you say you identified them by a cross in front of them—that all the 32 foot logs with a cross in front of them were really 34 foot logs which you scaled as 32 feet—isn't that the explanation you gave yesterday? [46]

A. I didn't understand it that way, Mr. Rustgard.

Q. Very well. Now, who put in this V which you have pointed out? Did you?

A. I did in that work right there.

Q. Who put the other signs in there?

A. That is this boy's writing there—the boy did that.

Q. Now, if you will take what purports to be the scale of the booms on May 3d, 26th and 31st, do you there find, according to your definition, any 34 foot

(Testimony of John R. Stevenson.)

logs that were scaled as 32?

A. Yes, according to that, there would be two there.

Q. Where are they?

A. Well, those two there.

Q. Where is your check-mark there, the V—you identify it, you say by a check-mark? A. Yes.

Q. Show the jury the check-mark.

A. There would be no additional check-mark.

Q. There isn't any there, is there? A. No.

Q. How do you know these two logs you pointed out to the jury were 34-foot logs?

A. Well, I just started to make them so.

Q. (By a JUROR.) Are those 30 or 32? A. 32.

Q. (By a JUROR.) Is there a check-mark on it?

A. No, there is an X behind it.

Q. (By Mr. RUSTGARD.) You say behind it—you mean to the left of it; I think you and I do not agree on what is the front end and what is the rear end. A. There is one.

Q. On page 28, in the first column, there are two notations of 32 each, meaning 32 long, does it?

A. Yes.

Q. Now, there is an X to the immediate left—you call that in the rear of the figure, do you.

A. I call it before the figure.

Q. In front of the figure? A. Yes. [47]

Q. That figure you showed the jury is the first column in the book, is it not? A. Yes.

Q. There are two logs marked 32 long, with a check-mark to the immediate right? A. Yes.

Q. Now, you said that check-mark indicated to

(Testimony of John R. Stevenson.)

you that they were really 34-foot logs surveyed by you as 32, didn't you?

A. No, I didn't say anything of the kind. I said they were exact 32-foot logs.

Q. Now, then, do you find any reference in that book except on the front page to those check-marks?

A. I don't see any of them.

Q. The only two check-marks you have been able to find in that book are those two in the first column on the first page, is that not right? A. Yes, sir.

Q. Now, then, do you want to be understood to say at this time, Mr. Stevenson, that all the other logs in that book marked 32, single logs, were really 34 but scaled as 32—is that it?

A. There were a lot of 34.

Q. All that haven't that check-mark, were they 34 scaled to 32?

A. No. There is any length log with that check-mark behind it, you would know was a single log.

Q. That check-mark indicates it is a single log, does it? Does it indicate anything else?

A. No, it doesn't, only they can be traced by the scale-stick to find the length of the logs.

Q. What does X in front of that figure stand for?

A. Single log.

Q. Then the X and the check-mark stand for the same thing, do they? A. No.

Q. What is the difference in designation? What does the check-mark mean to you? What does the X mean to you? [48]

A. My way of marking the identity of a certain

(Testimony of John R. Stevenson.)

length of a log. If you understand me right, the 34 foot logs, or 32 foot logs, or any other length log, can be traced on the back by the use of a scale-stick.

Q. Did you bring the scale-stick this morning?

A. Yes, sir.

Q. Will you take your scale-stick and trace one of those for us so we will see how it is done? How much variation have you got here? (Referring to scale-stick.)

A. I don't know how much you can get.

Q. Did you say this was a Scribner?

A. Yes, sir; that is a Scribner rule on there.

Q. How do you know?

A. I know the figures that are used by the Scribner rule—the figures are just the same.

The COURT.—What do you call that appliance that you hold in your hand?

The WITNESS.—This is a caliper scale.

Q. I call your attention now to page 28 of this scale-book, to the first column, a log marked 32 and with a cross in front—will you determine now whether or not that was really a 34 foot log or not?

A. 2140?

Q. Yes, that is the one I have reference to.

A. 2140 is scaled as a 32 foot log.

Q. Is it a 34 foot log or it is a 32 foot log?

A. If I was going to say I would say it was a 34 foot log scaled as 32.

Q. Now, will you explain to the jury how you found that from that scale?

A. You see, whatever your diameter is here and 32

(Testimony of John R. Stevenson.)

foot in length, and then it runs out here, and this says 32, and it would give you the exact number of feet in it, and in a 32 foot log, or other length log, on the back you could find the diameter by knowing how long it was. Now, 2,140 feet **[49]** would come here on a 32 foot scale, and by the use of that in that way you could trace the scale on the back.

Q. And what would show you that this would be the diameter. Which side would that be?

A. This side here.

Q. How do you know that that was not a 34 foot log scaled by you as a 32 foot log?

A. From my mark I would say it was a 34 foot log.

Q. What is your mark?

A. Just the mark in front of it to show that there wasn't anything else but the 34 feet.

Q. Now, then, inasmuch as you have already said that none of the logs which in this book are marked 32 have any check-mark in front of them except the two on the front page, would you say that all the logs in that book scaled by you as 32 were really 34—is that correct?

A. I don't understand your question.

Q. You have testified that you put the check-mark in front of two of the logs scaled by you as 32 feet to indicate that they were really 34 foot logs—that is correct, is it? A. Yes.

Q. Will you take this book again and look at it? You have testified that there are two logs in that book scaled as 32 feet long which were really 34 feet?

(Testimony of John R. Stevenson.)

Mr. HELLENTHAL.—I object to that—that is just the opposite to what he has testified to.

Mr. RUSTGARD.—I think that is true to a certain extent because he has testified both ways. Now, I want to see which way is correct. Haven't you stated, Mr. Stevenson, that those logs in that book which are shown as scaled as 32 feet, single logs—

A. Yes, sir.

Q. And which really were 34 feet long, are indicated by a check-mark in front? A. No, sir. [50]

Q. Very well. We will put it the other way, then. You mean to testify that all the logs scaled by you as 32 feet, and which have a check-mark in front, were 32 feet in fact, and not 34—is that correct?

A. Those that has a little V mark would be an exact 32 foot log.

Q. Now, then, would you say that all the other logs which have been scaled by you as 32 feet long and have no such check-mark were in fact 34?

A. All the rest?

Q. Yes. A. No, I wouldn't say that.

Q. How do you know? Can you tell from that book which were 34 and which were 32, and those which were scaled at 32?

A. Well, it might be possible such a thing that I could not tell them.

Q. Have you anything by which you can tell at all?

A. Well, I have my mark there which I indicated for those lengths.

Q. But have you anything but that check-mark

(Testimony of John R. Stevenson.)

which you have testified to?

A. No, I haven't anything but the check-marks to go by.

Q. And you have that check-mark used only twice on the first page, is that correct?

A. It may be different places in the book.

Q. Look and see.

A. I didn't see any when I was looking through it.

Q. I would like to have you look through that book and find out whether that check-mark is used any other place than the two places on the front page.

(Whereupon a recess was taken for five minutes.)

Q. Mr. Stevenson, did you examine the book looking for those check-marks? A. Yes, sir.

Q. Did you find any? A. No, sir.

Q. You testified that you scaled some logs here this fall for [51] some other parties at the mill?

A. I did.

Q. Who paid you for that?

A. I haven't been paid for it yet.

Q. Who did you send your bill to?

A. I look to Mr. Worthen to pay me for those scales.

Mr. RUSTGARD.—That is all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Stevenson, I direct your attention to the book and refer you to page one, which shows a 32 foot log with an X in front of it and a V behind it—two crosses there? A. Yes, sir.

(Testimony of John R. Stevenson.)

Q. As I understand, you have testified that that means that those logs were 32 foot logs scaled as 32 foot logs? A. Yes.

Q. And that they were single logs?

A. Single logs, yes, sir.

Q. Now, we come to page 18 of the book. I show you two 32 foot logs there with X in front and no V behind, nothing behind it—would it be possible for you to say absolutely whether those were 32 foot logs or 34 foot logs? A. I wouldn't say.

Q. Cannot say positively? No, sir.

Q. Did you try to keep up this matter of putting a check-mark back of them?

A. Yes, I had a system like that but for some reason it looks as though I didn't do it in this book.

Q. Now, Mr. Stevenson, will you take the calipers and show the jury how you put a caliper on a log, and your system of measuring these logs?

A. Well, we most generally go out on a log, and in calipering a log you will find the logs in the water will most generally ride the wide way in the water, and you caliper this way—keep your calipers flat here, and then stick the calipers out like this, and you look that way; then you turn your calipers up and down on the log the other way and it will give you any difference in the round of that [52] log. Your log may be 4 to 6 inches wider one way than it is the other; and then calipering that way, and dividing the difference between the extreme wide area and the extreme narrow, is midway, and in figuring that way it gives the difference in a log that isn't

(Testimony of John R. Stevenson.)

round, and we determine the distance by putting the calipers on this way, and the figures give the amount, the scale, and the length of the log. [53]

Testimony of H. S. Worthen, for Plaintiff (Recalled).

H. S. WORTHEN, recalled as a witness on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. S. HELLENTHAL.)

Q. Now, Mr. Worthen, as manager of the Worthen Lumber Mills, do you know whether or not the scales made by Stevenson under—ran or over-ran the lumber actually sawed out of those booms?

A. We were hiring a man to tally—

Q. Just answer my question—do you know?

A. Yes, I do.

Q. Does the lumber sawed out of those booms exceed Stevenson's scale?

A. I think in two instances only on the ten booms that we got a little more out than what Stevenson scaled.

Q. And the others sawed less?

A. We run under.

Q. And the actual cut was less than Stevenson's scale? A. On the whole total it was.

Q. On the total of the ten booms it was less?

A. Yes, on the total it was.

Mr. HELLENTHAL.—You may cross-examine.

(Testimony of H. S. Worthen.)

Cross-examination.

(By Mr. RUSTGARD.)

Q. Who checked the mill run of the booms here in question? A. Charley Ehlman.

Q. Is he here? A. No, he isn't.

Q. Who is he?

A. He is a tally-man I got from Puget Sound.

Q. How old a man was he?

A. I would say he is a man of 30 or 32 years of age.

Q. Did he tally all the logs or lumber run through your mill? A. Yes, sir.

Q. Did he reserve the record?

A. We haven't that record.

Q. What did you do with that record?

A. It was lost.

Q. How did it happen to get lost?

A. Well, each day's tally [54] was brought in and left on my desk on a little slip of paper that he made out, and I just put them in a pigeon-hole in the desk until the whole boom was cut and tallied up and then I threw them away; they were never entered in the book.

Q. Did you enter on the book each sheet, each tally, which he handed in? A. No, we did not.

Q. Why didn't you?

A. I didn't consider it of importance enough to do that. I wasn't figuring on a lawsuit—if I had been I would have entered them.

Q. How long did you keep those tally-sheets before you threw them away?

(Testimony of H. S. Worthen.)

A. I don't know. They laid around the desk there until they were lost or thrown away. There are a few of them down there now. I saw them last night in the desk.

Q. Could you state approximately how long they were there? A. No, I couldn't.

Q. How long did it take to saw up two hundred and fifty or three hundred thousand feet?

A. We cut an average of about 40,000 a day. Of course that varies—sometimes it comes down as low as 22,000, and sometimes as high as 65,000—depends on the logs and conditions.

Q. What other job did Ehlman have at the mill besides tallying? A. Nothing.

Q. He was kept there just for that purpose?

A. Yes, we hired him for that—of course you understand that a tally-man back of the trimmer saws keeps a record to know when the bills are cut out. He has got a list the same as a trimmer-man has, so he knows when each order is cut up, but he did no other manual work except that. [55]

Q. Now, when you testified in the injunction proceeding, when you were testifying about the tallying at the mill, I ask you whether or not you made the following answer to the following question asked by me: "Q. Have you no way then from the records in your office of determining how the mill-run compares with the boom scales? A. As I said, the way we done it—of course it may not be a very business-like way, and maybe not the way that some people do business, but we have tried several times to get an

(Testimony of H. S. Worthen.)

expert tally-man who would tally here and stay through the season; one landed in jail; another quit and went outside, and this one is still here, but he hasn't been able to keep the check at all times; in other words, he cannot grade the lumber and tally it too. Understand what I mean? As it comes from the saw there may be a dozen pieces of lumber come through in two minutes, and he cannot grade it and tally it at the same time; and it has been more important to the company, it has seemed to me, to grade the lumber than it was to tally it. If we have a boom of logs come in that we see there is no clear lumber in, and it isn't worth trying to grade, we tally it up and check it off against the scale; but if we find it is a boom of pretty good logs and with a little extra care he can select the good pieces, we drop the tally and grade it. In order to grade and tally we would require two men; and for that reason when he tallied a boom, each night he would take it in the office on a little slip of paper and lay it down on my desk, and when the boom was done I figured it up and compared it, and the slips of paper went into the waste-basket." That was your answer, was it? [56]

A. I could not remember it word for word; that was about the condition at the mill. When we were cutting clear timber we did that, but the logs that came from Portage Bay did not make that kind of lumber.

Q. You testified, too, at that time that the logs from Portage Bay were exceptionally fine timber?

(Testimony of H. S. Worthen.)

A. I think I did.

Q. Didn't you state that it was such an exceptionally high grade of timber that nothing like it could be secured anywhere else?

A. No, I didn't testify to anything like that.

Q. Didn't you assign that as the reason for applying for the injunction?

A. I never did say anything like that. I might have signed something like that, but I never thought anything like that in my own mind. I might say that out of the timber we got from Portage Bay the Government would accept as suitable stuff a trifle over one per cent.

Q. I thought you testified yesterday, Mr. Worthen, that you scaled the hemlock in the booms and gave McDonald credit for it?

A. That is my understanding, that he did; I didn't go on the booms to see whether he did or not.

Q. You sawed that anyway?

A. We cut everything that came in the boom that was worth cutting; the rest was turned adrift.

(Witness excused.)

H. S. WORTHEN, recalled as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Mr. Worthen, do you know which booms of logs the mill received from Schenk and McDonald?

A. Yes, ten booms. [57]

Q. Are those the same booms of logs that Mr. Ste-

(Testimony of H. S. Worthen.)

venson scaled, and has testified to? A. Yes, sir.

Q. You know that personally? A. Yes, sir.

Q. Are you acquainted with the boom of logs received by the Worthen Lumber Company that came from Duncan Canal in 1916? A. Yes, sir.

Cross-examination.

(By Mr. RUSTGARD.)

Q. You were not on the boat when the tug hooked on to the rafts to tow them up here?

A. No, I was not.

Q. Were you here always when your tug came in with a raft?

A. They might have come in with one or two rafts when I was not here; I was out to the Westward about a week; the rest of the season I was except about a week, from Monday to Friday, I was out.

Q. You didn't check Mr. Stevenson's scale of the rafts? A. On the water?

Q. Yes. A. I didn't rescale after Mr. Stevenson.

Q. Didn't make any note of how many culls there were, or bad logs there were?

A. Only as they came up in the mill; I observed them as they came up in the mill.

Q. You didn't stay in the mill and watch each log, did you?

A. No, but I was there practically all of the time—10 hours a day—I was there often enough to see the logs coming up.

Q. Have you figured up on your exhibit "G" the amount of culls and the deductions.

(Testimony of H. S. Worthen.)

A. It is figured up here.

Q. What are the deductions, including culls?

A. I think it is figured 38,470 feet. [58]

Q. What is the total scale? A. 451,520.

Q. 451,520 feet is the total scale, from which you deduct some 38,000 feet, is that correct?

A. That is what it is here—I haven't checked this over for a long time—I haven't been over it recently, and I might be mistaken on the exact figures, but I have a note on the bottom of the page.

Q. Your statement is right there on that schedule you hold there, isn't it?

A. Why, it is unless there is some error in it.

Q. You referred to the first logs from Portage Bay being good timber—you mean the logs delivered in 1916?

A. No, the first part of 1917 I am speaking about.

Q. The first logs under the 1917 contract were good logs? A. Very fair logs.

Q. And they kept getting worse? A. They did.

Q. Stevenson made allowance for the splits, did he not? A. I suppose he did—he should.

Q. That is the scaler's business?

A. Supposed to be.

Q. He made allowance for rot—that is also the scaler's business?

A. That is his business—I suppose he did—I do when I am scaling.

Q. Did you count the number of pieces in each raft as you received them?

A. They are counted and signed for at the camp.

(Testimony of H. S. Worthen.)

Q. They are counted at the camp?

A. Yes, supposed to be.

Q. They are supposed to be? A. Yes.

Q. Sometimes they didn't bring in all the pieces they hooked on to, did they?

A. As far as I know they did. There was no report came in of any shortage, not from this camp. We lost a whole boom last fall, and they reported that; and they lost a part of another boom in November.

Q. Didn't your men lose some logs out of a boom they got from McDonald?

A. Not that I know of. Of course I don't know [59] what transpires on the water any further than what they report when they get here.

Q. Didn't you testify in this court on the injunction proceeding that you knew of one raft where your men lost half a dozen sticks?

A. I don't recall it now.

Q. Did I ask you this question on that examination: "And that is all that has been delivered under the contract?

A. Yes, sir. I would like to add by way of explanation that in one of those booms there were five logs lost out of the peak coming up, for which, in looking over the books, I discovered there had been no allowance made to Mr. McDonald"—did you so testify?

A. I might have—I dont recall it at this moment.

Q. For all you know there might have been several logs lost?

A. They might have lost them all for all I know,

(Testimony of H. S. Worthen.)

but they got here with some—I wasn't out on the boat on a single trip.

Q. Under the contract the logs were yours when you hooked on to them at Portage Bay?

A. That is what the contract says.

(Witness excused.)

Testimony of J. R. Stevenson, for Plaintiff (Recalled).

J. R. STEVENSON, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. I hand you here your scale-book and ask you whether or not the second column of each scale—what that contains?

A. It contains the full scale of the log.

Q. Including the rot, split and all? A. Yes, sir.

Q. What does the third column indicate?

A. It indicates the discounts—the waste that is in the log.

Q. Allowed for rot, split, and any allowance made?

A. Yes, sir, that is the deduction for defects.

(Witness excused.) [60]

DEFENSE.

Testimony of Gordon D. McDonald, in His Own Defense.

GORDON D. McDONALD, one of the defendants herein, being first duly sworn, testified in his own behalf as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. State your name. A. Gordon D. McDonald.

Q. You are one of the defendants in this case?

A. Yes, sir.

Q. I call your attention to the testimony of Mr. Worthen in reference to the contract made with him in writing in the spring of 1916—the 27th day of March, 1916, exhibit "A," and ask you whether or not any timber was delivered by you at any time under that contract? A. Not as far as I know.

Q. You would know it?

A. I would know it if there was any delivered from the place that the contract states.

Q. What conversation, if any, did you have with Mr. Worthen about delivering timber under this contract of 1916?

A. We had no other statement until he asked if we had any logs he could get. We were in the piling business at the time the contract was written up, at the time it was sent to me, through a conversation that we had some time in the spring of the same season, and I had a piling camp at the place named in the contract there, or somewhere in the

(Testimony of Gordon D. McDonald.)

vicinity of that country there.

Q. That is on the north end of Prince of Wales Island? A. Yes.

Q. And this contract provides for the delivery of logs from that place. Now, then, what I asked you is after this contract was signed for logs from the north end of Prince of Wales Island did you have any talk with him as to why no logs could be delivered from there or should be delivered?

A. We had a talk, yes.

Q. What was that?

A. Mr. Worthen asked me if the timber was suitable or was very good and I told him I would look through [61] it. After looking through it the timber didn't appear to be very good so we did not apply for a sale.

Q. At the time you say you entered into the contract he asked you about the timber, and the quality of it? A. Yes.

Q. And you stated you thought it was all right?

A. I thought it was at that time—that is before I had looked through the timber.

Q. At that time you had not bought it from the Government? A. No.

Q. And you told him you would look it over again?

A. Yes.

Q. What did you tell him after you had looked it over?

A. I told him I didn't think the timber was very good.

Q. Did you apply for a sale?

(Testimony of Gordon D. McDonald.)

A. No, I did not.

Q. What time did you have that last talk with Worthen that you have testified to?

A. I think it was some time in the first part of April. I cannot say for sure.

Q. 1916? A. Yes, 1916.

Q. Anyway it was a short time after the signing of the contract? A. It was shortly after.

Q. Now, after that time did you deliver any logs to Worthen?

A. I delivered a boom from Portage Bay—a small boom of logs.

Q. How did you come to deliver those logs to him?

A. The captain of the "Carrita" was in Petersburg during the spring, towing logs from Hauseth camp across from Petersburg, and the captain asked me if I knew where they could get a boom of logs, that the mill was short of logs, and I told him that I had a boom that I had arranged the sale of with the Wrangell Mill Company, and I told him if it would benefit him in any way he could take it up with Mr. Worthen so he could get it, and he did, on his trip to Juneau that time, he talked it over with Mr. Worthen, and he came back and finally got the boom. [62]

Q. That was the only conversation you had with Mr. Worthen about the first boom from Portage Bay in 1916? A. Yes, sir.

Q. What time in 1916 was that?

A. That was in April, as near as I can recall—I don't know just the date.

(Testimony of Gordon D. McDonald.)

Q. After that did you deliver any logs to Worthen in 1916? A. We did.

Q. Now, where were those logs taken from?

A. Taken from Port Malmsbury in the south end of Kuiu Island.

Q. How did you happen to deliver those two?

A. A similar occasion.

Q. That isn't sufficient. Tell the jury who you conferred with in regard to it.

A. As far as my mind goes on that, I think I had a talk with Mr. Worthen in January here, after I was here in the spring, and he asked if he could get those logs, and he also took it up with the George E. James Company who had the logs or who the logs were put in for in the first place, and they refused to let him have them, as far as I understood from the conversation I had. The James Company afterwards told me I could dispose of them if I wanted to—that is, if I see fit they wouldn't hold them any further—they were not able to take them at that time.

Q. They were logs that were out for the James Company? A. Yes.

Q. And subsequently at the request of Mr. Worthen they released you? A. Yes.

Q. And you turned them over to Worthen?

A. Yes.

Q. And what time was that?

A. It was in June.

Q. June, 1916?

(Testimony of Gordon D. McDonald.)

A. Yes, about the 24th of June when their tug-boat came into camp.

Q. Into what camp?

A. Into the Malmsbury camp—Port Malmsbury.

[63]

Q. That was the "Carrita"?

A. That was the "Carrita."

Q. The "Carrita" took the raft in tow?

A. They took it in tow on the morning of the 24th, at 3 o'clock in the morning.

Q. Now, after that did you deliver any raft to Worthen that season?

A. We delivered a boom from Port Malmsbury around the 12th or 14th day of July.

Q. How did you happen to deliver that?

A. He sent his boat down there for logs.

Q. And they hooked on to the raft and took it?

A. Yes.

Q. Did you have any further conversation with Worthen in regard to that?

A. Well, we had a conversation here at the time, here in Juneau, that season, along about the middle of the season, in regard to logs in Duncan Canal, and he asked if he could get some logs from Duncan Canal, as near as I remember, and I told him I would give him a boom from Duncan Canal, and he got the boom in September.

Q. What time did you have that conversation with him?

A. That was in July, or around the first part of July, I think; it was during the time I was up on

(Testimony of Gordon D. McDonald.)

the boat that we helped them through here to Juneau on.

Q. Now, those 4 rafts you have testified to, the small one from Portage Bay, the two from Port Malmsbury and the one from Duncan Canal, were all surveyed or scaled by the Government rangers?

A. Yes, sir.

Q. Do you know which one of the rangers scaled the rafts?

A. Mr. Allen scaled the Duncan Canal boom and the Portage Bay, and I think, I wouldn't say for sure whether it was Babbitt or Peterson that scaled the Port Malmsbury timber; I think there was one of them scaled by Babbitt here in Juneau, and as to the other I don't know which one of the scalers did [64] scale it—the Government record will show that; their record will show the man who scaled it.

Q. Now, then, come to the contract for 1917, signed January 4th, were you in Juneau at the time that was signed up? A. Yes, sir.

Q. How many rafts did you deliver to Mr. Worthen or the Worthen Lumber Mills under that contract? A. Ten booms.

Q. When did you deliver the last boom to him under that contract?

A. Sometime in August, as near as I can remember; I couldn't state just the exact date.

Q. But sometime in August—do you remember whether or not it was the middle of July?

A. I couldn't say that. The last boom—

Q. The records would show.

(Testimony of Gordon D. McDonald.)

A. Yes, the records should show the date that it was delivered to them on.

Q. Did you deliver logs from Portage Bay in 1917 to anybody else but the Worthen Lumber Mills until this trouble came up? A. No, sir.

Q. After that you delivered some logs—

A. I delivered two booms to the George E. James Company.

Q. Subsequent to this trouble? A. Yes, sir.

Q. Now, then, the first ten booms cut, scaled and delivered from the Portage Bay sale were delivered to Worthen? A. The Worthen Lumber Mills.

Q. Where did he receive those rafts?

A. Portage Bay.

Q. His tug came and hooked on to them?

A. Yes, sir.

Q. Who were they scaled by?

A. They were scaled by ranger Allen, that is, with the exception of several booms that was towed before he could get around to scale them and they were taken through here to Juneau and ranger Babbitt scaled them **[65]** here in Juneau.

Q. Referring to the Duncan Canal boom which was hooked on to by the "Carrita" at Duncan Canal, do you remember where it was scaled?

A. Scaled in Beecher Pass.

Q. Where is that?

A. That is a small body of water between Wrangell Narrows and Duncan Canal.

Q. How did it happen to be scaled there?

A. It was scaled there after it was broken up by

(Testimony of Gordon D. McDonald.)

the Worthen Mills boat and towed back into Duncan Canal to be re-boomed, and ranger Allen was notified before the time or about the time their tug boat went through and he was on his way down there to scale the boom, and he met the boat there in Beecher Pass.

Q. And after the raft was put together again he scaled it? A. Yes, after it was re-boomed.

Q. Before you signed the second contract did you have an accounting with Worthen for your work in 1916? A. We mentioned it, yes.

Q. Did you agree upon the amount due?

A. We did not agree upon the amount due.

Q. At the time of adjournment this forenoon, Mr. McDonald, you were testifying to your negotiations with Mr. Worthen of the Worthen Lumber Mills, as to the contract for 1917—that was about New Years of 1917? A. Somewheres around there.

Q. You were here several days at that time?

A. Perhaps about a week—somewheres along there.

Q. Now, I would like to have you state what at that time was said between you and Worthen in reference to the account for 1916.

A. The question came up about a settlement of the 1916 business and Mr. Worthen, as near as I remember, said that there was something about the scale that he wanted to get **[66]** from some of the forest men in regards to the last boom, from Duncan Canal.

Q. What did you say, if anything, to that?

(Testimony of Gordon D. McDonald.)

A. I told him that I would get the scale from Allen, or I had got it, and I would send him a copy of it or give it to him the first time I saw him. I don't know just what was the conversation, but it was to that effect—it amounted to that, anyway.

Q. At that time was there anything said as to the towing bill?

A. Yes, the towing bill was brought up at the same time, or about the same time, and Mr. Worthen said he was willing to pay what was reasonable on the towing bill, and he asked me to make out a bill and send him covering the towing.

Q. Now, referring to your statement, the charge you have made was for logs sold Worthen according to the Government scale?

A. That is according to the Government scale.

Q. Furnished you? A. Furnished me, yes.

Q. The correctness of that you do not testify to of your own knowledge? A. No, I do not. **[66-A]**

Mr. RUSTGARD.—We wish to offer that statement, your Honor, for the purpose of being used by the jury as a memorandum of the witness' testimony.

Mr. HELLENTHAL.—I object to any scale made under the 1917 contract by anybody unless it is made in accordance with the contract. There is a provision in the 1917 contract which provides how this thing is to be settled and unless it is in accordance with that provision we object to the scale.

The COURT.—What is the point of your objection?

(Testimony of Gordon D. McDonald.)

Mr. HELLENTHAL.—This is our point. The 1917 contract provides that the mill scale shall be the scale to be used. In the contract it further provides that all logs shall be paid for in 30 days, and in case of a dispute the scale made by a disinterested party shall be the controlling scale.

The COURT.—What about the 1916 contract?

Mr. HELLENTHAL.—If your Honor please, the 1916 is the same but there is evidence here which disputes whether the logs were delivered under the contract or not, so I do not want to insist upon the 1916 contract. (Argument by both counsel to the Court.)

The COURT.—Gentlemen, I have thought about this contract and it seems to me that it should be read this way—I cannot see any other way to do it. "Said logs shall be scaled by the Scribner log rule, and the said first party agrees to accept the mill-scale." That is printed. Then further down it says, "and in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery." I cannot see how that **[67]** means anything but this: The logs shall be scaled at the mill and the result shall be accepted, and payment shall be made inside of 30 days unless within that time there is a dispute. Put the shoe on the other foot. Suppose a lot of logs were delivered at a mill and the mill scaler scales them and they amount to 500,000 feet more than are really in the boom. Suppose the

(Testimony of Gordon D. McDonald.)

Government scaler had scaled those logs before they had got to the mill and he found that there were 500,000 feet less than the mill scale shows it, but the mill man pays for those logs according to his scale—does not discover that there is anything wrong at all—does not dispute his own scale, and pays for them. The 30 days elapses and there is no dispute of any kind. Do you think the millman could go back to the logger and make him rebate the difference? The logger would say, "you paid me according to your scale?" "Yes." "What right have you to come back on me? That was my contract. I was to take the mill scale and the mill scale was so much; I didn't dispute it and you didn't dispute it, and you have paid me and your 30 days is up." How could the millman complain? Then how can the logger complain? A certain number of logs are delivered at the mill and they are to be paid for within 30 days and the mill scale is to be accepted unless there is a dispute, and there is no dispute, and the money is paid. I think the mouths of both parties are closed. I cannot see any other way out of it. If people make that kind of a contract there is nothing unreasonable about it—there is nothing unconscionable about it. I think it entirely depends on whether there was any dispute inside those 30 days—especially if **[68]** money has been paid within those 30 days or before any dispute has arisen. That being the case I do not think it is material what the forestry scale was.

Mr. RUSTGARD.—I will base my questions on

(Testimony of Gordon D. McDonald.)

the Court's ruling and ask questions for the purpose of getting my exceptions into the record.

The COURT.—Very well. Of course when you ask questions if it changes the situation at all my ruling may change. You cannot get me to rule and then ask a lot of questions outside of my ruling with the idea that they are covered by my ruling—they may be or they may not be.

Mr. RUSTGARD.—I will lead up to the point now and get the record in such shape that I can dismiss the forester if the Court adheres to that ruling after my questions.

Q. (By Mr. RUSTGARD.) Mr. McDonald, do you know what is meant by "mill scale"?

A. I don't know; as far as I know—

Mr. HELLENTHAL.—I object to that as attempting to vary the terms of a written contract. This contract provides what the mill scale is. It not only says mill scale, but designates the mill-scale—what it shall be.

The COURT.—I do not think you can ask him, "Do you know what is meant by mill scale?" He signed this contract, but you may ask him what is a mill scale? He is supposed to know what it is. He uses the term in his contract.

Q. Did you see the term "mill scale" used or hear it used before the time it was used in the contracts here?

Mr. HELLENTHAL.—I object to that because it was his duty before [69] signing the contract

(Testimony of Gordon D. McDonald.)

that the mill scale was to be used to ascertain what mill scale meant.

The COURT.—I do not think that question is competent. He uses the term in this contract. It does not make any difference whether he ever saw it before or not. You can ask him what it means.

Mr. RUSTGARD.—He has already answered that he doesn't know.

Q. At the time this contract was signed did you have any talk with Mr. Worthen as to what interpretation was to be placed upon it?

Mr. HELLENTHAL.—I object to that. The contract not only says it is the mill scale, but it provides that it shall be made by the Scribner rule. The Scribner rule is a well-known method of scaling logs.

The COURT.—Objection sustained. That is not the question. The question is what is a mill scale. He uses the terms of an industry that has its own phraseology, supposed to be known to the persons that are using it, but perhaps unknown to the jury. Now, he may be asked what is meant when the term "mill scale" is used between loggers and millmen, because the jury do not necessarily know what that means, but I think any representations made by Worthen to him as to what he understands by it, or by him to Worthen as to what Worthen understands by it, are all merged in the contract. Otherwise there would be no safety in making a contract.

Mr. RUSTGARD.—I will put the question again which I put before to the witness, with the Court's indulgence.

(Testimony of Gordon D. McDonald.)

Q. Do you know at this time what is meant by the term mill scale when used in a contract of this kind, or in the logging business?

Mr. HELLENTHAL.—I object to that as being incompetent. **[70]**

The COURT.—I think that question is competent —what is meant by the use of the word mill scale when used in a contract of this kind—that is, a contract between a logger and a millman. It is a technical term. He can answer what it means when so used.

A. I don't know just the way this question is put —we had a discussion—

Q. My question is do you know what it means? You can answer that yes or no.

A. I wouldn't answer it no; as far as I know at the present time it could lead up to many and various things.

Q. Did you have any discussion with Worthen at the time of the signing of this contract what it meant?

Mr. HELLENTHAL.—I object to that as incompetent.

The COURT.—What is the object of that?

Mr. RUSTGARD.—The object of it is to show that this witness at the time of signing this contract did not know what the term meant, that it was a new term to him and he asked Mr. Worthen to explain it and Mr. Worthen explained at that time what it meant, and it was in view of that explanation that the contract was signed by this witness. He relied

(Testimony of Gordon D. McDonald.)

upon that explanation and interpretation by Mr. Worthen.

Mr. HELLENTHAL.—I object to that for the reason that the term mill scale is a term that has a well-defined meaning in the logging business, and there is no allegation of fraud, your Honor, in the complaint any place, and for that reason the common accepted meaning of the words mill scale should control, and if he knows what that is he can give that to the jury, but that it is the limit.

The COURT.—I will sustain the objection.

Q. Mr. McDonald, after the logs or rafts were delivered to the towboat, the "Carrita," of the plaintiff company, you don't [71] know whether they reached the mill or not? A. I do not.

Q. Under the contract they were his when he hooked on to them? A. That was the agreement.

Q. Now, then, did you ever ask him for a statement or an accounting before this suit was brought?

A. We asked him for a statement at the time we came up here to settle for the year's business of 1916.

Q. And after that time did you ask him for any statement of the account for 1917?

A. Yes, we asked him at that time for a statement covering also 1917.

The COURT.—What time was that, Mr. McDonald?

A. That was at the time the dispute arose, and we had not received any scale at that time or any other time.

(Testimony of Gordon D. McDonald.)

The COURT.—What time was it that you asked him for a statement on the 1917 contract?

A. It was in the latter part of August, along about the 20th or 25th, somewhere along the last part—I couldn't say the exact date.

The COURT.—That was the first dispute you had?

A. That was the first—the first time we ever received a statement or a scale from the Worthen Mills. He had never issued any statement of his scale or anything about it.

Mr. RUSTGARD.—May it please the Court, I do not care to ask this witness any more questions at the present time. I would like to ask that the witness stand by and counsel can cross-examine him later on, and I will put one of the Government rangers on so as to get my evidence informally and get my exceptions.

The COURT.—Very well.

(Witness temporarily withdrawn.) **[72]**

Testimony of James Allen, for Defendants.

JAMES ALLEN, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. State your name. A. James Allen.

Q. What is your occupation?

A. Forest ranger.

Q. You are familiar with this timber which you

(Testimony of James Allen.)

have heard referred to in this case as having been cut by Schenk and McDonald and sold to Worthen?

A. Yes, sir.

Q. Do you know where it was cut? A. I do.

Q. Is that on the United States Forest Reserve in this part of Alaska? A. Yes, sir.

Q. All of it? A. Yes, sir.

Q. It was sold to the logger under the rules of the Bureau of Forestry of the United States?

A. Yes, sir.

Q. How long have you been with the Bureau of Forestry as a forest ranger? A. Since 1908.

Q. What has been the principal part of your duties during that time in reference to logging?

A. Well, I am usually scaling.

Q. Scaling has been your principal duty. Now, how long have you been working with logs and lumber, Mr. Allen?

A. Ever since I was big enough to work.

Q. How long is that since, approximately?

A. Twenty-five years.

Q. You were brought up in the logging and lumbering business? A. Yes, sir.

Q. How did you learn to scale logs?

A. By working with a competent scaler and getting orders from him.

Q. Did you scale that raft of logs referred to as the Duncan Canal raft cut by Schenk and McDonald and turned over to Worthen in September, 1916?

A. I scaled all the rafts from that particular place.

(Testimony of James Allen.)

Q. Now, where was the raft when you scaled it?

A. If it is the **[73]** particular raft which I think it is I scaled it in Beecher Pass.

Q. It had gone to pieces and was put together again there? A. Yes, sir.

Q. Do you remember the date of your scale?

A. I have the records here.

Q. Will you refer to your records and state the date?

The COURT.—We can save a great deal of time if you make your offer of what you intend to prove by this gentleman—that the forestry scale of these logs was something different from the mill scale testified to by the plaintiff; then I will overrule your offer and you can take your exception.

Mr. RUSTGARD.—Very well.

The COURT.—There is no use to put a witness on and ask every question when you can accomplish the same thing by making your offer and having the Court rule on it.

Q. I will ask you whether or not you scaled that raft on the 15th of September, 1916. I think counsel will concede that is the same raft, will you?

Mr. HELLENTHAL.—I don't know exactly the date.

Mr. RUSTGARD.—It was hooked on to and was scaled by Mr. Allen on the 15th of September, 1916.

The WITNESS.—That is what I have here.

Mr. RUSTGARD.—That you scaled it?

A. Yes, sir.

Q. (By Mr. RUSTGARD.) Counting spruce and

(Testimony of James Allen.)

hemlock together, what did that scale?

Mr. HELLENTHAL.—I object to that as incompetent, irrelevant and immaterial.

The COURT.—Is the object and purpose of this, Mr. Rustgard, to show that the scale is something different from what has been testified to as being the scale of the mill? [74]

Mr. RUSTGARD.—My object is to prove that the scale testified to by Mr. Stevenson is fraudulent and not a true or honest scale of what is referred to as the Duncan Canal raft. Moreover, I propose to prove that if the scale made by Stevenson, as testified to by him, is not fraudulent it is of a different raft from the one which was delivered by Schenk and McDonald to the Worthen Lumber Mills.

The COURT.—Very well if you can prove it is a different raft you will be allowed to do so, but you must do so by somebody who knows what raft was delivered. You cannot prove what the Court thinks you are trying to prove under the guise of proving it was a different raft by somebody who doesn't know anything about what raft was delivered. Now, if this gentleman knows what raft was delivered he may testify, but it cannot be done by evasion and equivocation.

Mr. RUSTGARD.—I will prove by Mr. McDonald that this raft which Mr. Allen has testified he scaled is the one which he delivered to Worthen and for which he has charged Worthen.

The COURT.—The one that he delivered to Worthen?

(Testimony of James Allen.)

Mr. RUSTGARD.—That McDonald delivered to Worthen, or to the Worthen tow boat, and I submit to the Court, and I want it in the record, that at the present time there is nothing tangible to show that the raft which was surveyed or scaled by Mr. Stevenson is the raft which Mr. McDonald delivered to Worthen. I will state to the Court that I shall prove that the difference between the true scaled contents of the raft and the scale testified to by Mr. Stevenson is so great that either it proves it was not the same raft or else there was a fraudulent scaling. That the difference in the gross scale as well as in the lineal [75] feet is so great as to prove fraud.

The COURT.—If you can prove that the raft delivered was not the raft that was scaled I will permit you to do so. I shall instruct the jury, however, that the mill scale is the scale which governs, and that is the scale that they are to accept. If you can prove that the logs scaled were not the logs delivered it may be a different question.

Mr. RUSTGARD.—I will prove that the logs scaled by Mr. Allen were the logs delivered by McDonald. Now, then, whether or not these logs were the logs which Stevenson scaled, of course, I don't know and nobody else seems to know who has testified.

The COURT.—Proceed.

(Whereupon the last preceding question was read to the witness.)

Q. Counting spruce and hemlock together what did that scale?

(Testimony of James Allen.)

Mr. HELLENTHAL.—It is admitted under the ruling of the Court?

The COURT.—I permit the defendant to show that the logs delivered to Worthen under this contract of 1917 were not the logs that Worthen had scaled at the mill. If they are the same logs I shall instruct the jury that the mill scale is the scale that, under the terms of the contract, is to govern. Of course that has reference to the number of feet, in the logs.

Mr. HELLENTHAL.—Might I suggest then, your Honor, that we proceed in the ordinary course of proof with that—that we have the proof first as to the diversity of the rafts before we get the amounts of the rafts?

The COURTS.—Yes, I think I shall require that. I shall require that this witness testify to something to identify the rafts he is talking about. **[76]**

Mr. RUSTGARD.—I did not expect to prove by this witness anything except the true contents in board measure of the rafts in question. I will have to prove by McDonald afterwards that this particular raft which this witness testifies to now was the one delivered to Worthen.

The COURT.—The Court will insist that you put a witness on the stand first to identify the logs that he is talking about before you put this witness on as to the difference in the number of feet.

(Witness temporarily withdrawn.)

Testimony of Gordon D. McDonald, for Defendants (Recalled).

GORDON D. McDONALD, recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. Mr. McDonald, you are acquainted with Mr. Allen? A. Yes, sir.

Q. You have heard him testify that he scaled a certain raft in Duncan Canal on the 15th of September, 1916? A. Yes, sir.

Q. Is that the Duncan Canal raft which you have heretofore referred to and which you delivered to the Worthen Lumber Mills? A. Yes.

Mr. RUSTGARD.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Where did you deliver that raft to the Worthen Lumber Mills?

A. I delivered that raft to the Worthen Lumber Mill in Duncan Canal.

Q. That is all you know about it?

A. That is all I know—I know that.

Q. That is all you know about that being the raft that Stevenson scaled?

A. I was on the raft when it was scaled in Duncan Canal. [77]

Q. You know Allen scaled it?

A. I know Allen scaled it.

(Testimony of Gordon D. McDonald.)

Q. You don't know anything about whether that is the raft that Stevenson scaled?

A. I know nothing about it after it leaves my presence. They were to be delivered under the agreement when he hooked on to them.

The COURT.—Where were they to be delivered under your agreement?

A. They were to be accepted at the camp and they are no more our logs when he hooks on to them. That is the rule everywhere in regard to any timber—or at least it is the customary rule.

The COURT.—That being the case, the logs are delivered when the tug boat takes them—the logs are delivered down there?

Mr. RUSTGARD.—They become Worthen's property that moment.

The COURT.—Very well, proceed.

Q. You didn't come to Juneau at all and you don't know what happened here?

A. I don't know anything about it.

Q. You paid no more attention to any of these rafts after they hooked on to them? A. Nothing.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

Testimony for James Allen, for Defendants (Recalled).

JAMES ALLEN, recalled as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

(Testimony of James Allen.)

Direct Examination.

(By Mr. RUSTGARD.)

Q. What system of scaling did you use?

A. The Scribner Decimal C scale rule.

Q. I ask you to look at this instrument which Stevenson testified he used—is that the same system?

A. I would have to compare it to tell you in detail.

Q. This is a Decimal C, isn't it?

A. It looks that way—I [78] couldn't swear to it only certain figures—I couldn't tell you all the way through.

Mr. RUSTGARD.—Will you concede it is a Scribner Decimal C?

Mr. WORTHEN.—I haven't been able to get a Government Decimal C to compare it with.

Mr. HELLENTHAL.—We will stipulate they are the same—there are the same figures on them.

Q. These calipers and this scale used both by Stevenson and the Government is what is known as Scribner Decimal C? A. Yes, sir.

Q. They are the scales you also used?

A. Yes, sir.

Q. Now, then, what did you find that raft from Duncan Canal to contain in board measure?

Mr. HELLENTHAL.—I object to that. He has not shown that the boom scaled by Stevenson was not the same boom that he has scaled. There is not a scintilla of evidence to show that. He simply has shown that the boom was delivered to the Worthen Mills, but he has not shown that Stevenson has scaled the boom that was delivered to the Worthen Mills

(Testimony of James Allen.)

known as the Duncan Canal boom.

The COURT.—Let me ask you, Mr. Rustgard. Do I understand you are offering this evidence for the purpose simply of showing that it could not be the same raft because according to the forestry scale there were more feet in it than the scale of the mill shows?

Mr. RUSTGARD.—Yes, but with this addition, I want to show that the difference in the scale is so great that it precludes the idea of an honest scale by Stevenson if it was the same raft. The difference both in gross scale and lineal feet is too great.

The COURT.—Very well. Now I understand just exactly what you want. All testimony on that subject, devoted to that purpose [79] is excluded. If that is the only way you propose to show it is not the same raft, by simply showing there were more feet in it according to the Government scale than there were according to the mill scale, and you say it is, it is excluded. It is not a question of how many feet—it is a question of the identity of the raft. If it is not the same raft it does not make any difference how much the forester found there was in it.

Mr. RUSTGARD.—I wish at the present time to make an offer,—and I make it in writing. I offer to prove by this witness that the raft in question contained 516,680 board feet measured after all bad logs or defective logs or defective parts of logs had been excluded from the count by the ranger.

(Offer objected to as immaterial and objection sustained by the Court.)

(Testimony of James Allen.)

Q. Mr. Allen, did you scale any raft of logs cut by Schenk and McDonald at Portage Bay on the 24th day of March, 1917?

A. I very likely did—I don't remember just the date.

Q. Will you get your records to determine?

A. Yes, sir, I did.

Mr. RUSTGARD.—Will counsel concede that that is the raft from Schenk and McDonald delivered to the Worthen Lumber Mills and which is included in the bill of particulars as raft No. 1, 1917?

Mr. HELLENTHAL.—I think so.

Q. Did you use the same system of scaling which has been testified to already? A. Yes, sir.

Q. (By Mr. HELLENTHAL.) I would like to ask you one question here—did you scale 34 foot logs as 34 feet long or as 32 feet long?

A. As 34 feet long—made two cuts of them yes.

[80]

Q. (By Mr. RUSTGARD.) Hove you kept track in your records of the logs which were actually 34 feet and which you scaled as such? A. Yes, sir.

Q. And you have those records with you now?

A. They are all contained in the scale sheets.

Q. You are in position at the present time then to state how many logs in that raft were 34 feet long and scaled as such? A. Yes, sir.

Q. Have you yourself figured out the scale of those 34 foot logs in excess of 32 feet?

A. Mr. Weigle and I did.

Q. Mr. Weigle and you did together?

(Testimony of James Allen.)

A. Yes, sir.

Q. You are able then at the present time to state what that excess was? A. Yes, sir.

Q. I ask you now, Mr. Allen, to state what that raft contained in board measure excluding 2 feet on all 34 foot logs which were scaled as such?

Mr. HELLENTHAL.—I object to that as being immaterial.

The COURT.—The objection is sustained, and the objection will be sustained to all the other 8 rafts, when it comes in that way. The Court ruled that if the only object and purpose, and way, in which you propose to show that these rafts are not the rafts which were scaled is by the discrepancy in the number of feet as shown by the mill scale and as shown by the forester's scale, then the testimony, the Court rules, is incompetent and irrelevant.

Mr. RUSTGARD.—I understand the Court's position on it, and I am not asking these questions to worry the Court—I am asking them because I want to get the record in shape.

The COURT.—I know, but it takes up time, and I am telling you that I make the same ruling on all the other eight rafts. [81] You make one offer for the whole thing, and the Court will make one ruling on the whole thing—I will reject the offer—that preserves your record.

Mr. RUSTGARD.—Very well, your Honor. I offer to prove by this witness that the other nine rafts which McDonald has testified he delivered to Worthen at Portage Bay in 1917 were scaled by this

(Testimony of James Allen.)

witness as a forest ranger, scaled for the Government—I offer to prove that he scaled those 10 rafts.

The COURT.—You offer to prove that the amount of board measure and lineal feet in the rafts that were delivered to the mill was greater than shown by the mill scale? You may give the figures in each raft to the stenographer, and what you expect to prove the difference is in each raft, and that preserves your exceptions.

Mr. RUSTGARD.—The only ruling I had in mind was this, that the Court has held if you make the offer without having your witness on the stand you cannot raise it as error.

The COURT.—I do not remember any such ruling as that.

Mr. RUSTGARD.—I do. I offer to prove by this witness that on behalf of the Government, as a forest ranger, he scaled the ten rafts at Portage Bay before they were delivered to the Worthen Lumber Mills; that they are the same rafts which McDonald has testified that he, McDonald, did, at that place, deliver to the Worthen Lumber Mills, and that the scale was as follows: 281,960; 268,080; 219,220; 217,280; 230,870; 230,930; 314,970; 273,590; 273,320; 359,860; total 2,670,080, and that this is the scale after all bad logs, splits, stakes and discounts of 2 feet on each 34 foot log had been eliminated.

The COURT.—The ruling will be the same. [82]

Mr. RUSTGARD.—Before I dismiss this witness, your Honor, I wish to make the offer further to prove by other witnesses that the actual scale made by this

(Testimony of James Allen.)

witness of these rafts was a correct scale of the actual board feet contained in the rafts.

The COURT.—Very well, the ruling will be the same.

Mr. RUSTGARD.—That is all.

(Witness excused.)

Mr. RUSTGARD.—I ask if it is understood that the reason I offered the evidence was partly to show by this evidence that the scale of Mr. Stevenson was fraudulent or he had scaled the wrong booms? That is, I have assumed that that would apply to all my offers.

The COURT.—Yes, but the Court understood you to mean that the fraudulent character was to be shown by the discrepancy in the two scales? You propose to show it was fraudulent by showing a discrepancy in the two scales?

Mr. RUSTGARD.—The discrepancy between the two scales, together with the number of lineal feet in the rafts accounted for by Mr. Stevenson and accounted for by the Government.

The COURT.—Yes, I understood that—and by that alone.

Mr. RUSTGARD.—Yes, that in connection with the testimony given by Worthen and Stevenson themselves.

The COURT.—The offer is rejected.

JAMES ALLEN, recalled on behalf of the defendants, having been previously duly sworn, testified as follows:

Mr. RUSTGARD.—I offer to prove by this wit-

(Testimony of James Allen.)

ness that he scaled the rafts which McDonald has testified he delivered to the Worthen Lumber Mills at Portage Bay in May, 1916, at Malmsbury, June 26th, or in the spring of 1916, and Duncan Canal. The witness has already testified to the Duncan Canal raft, but I offer to prove that the scale of those rafts was as follows [83] after allowing for all defective logs, splits, etc., the same as the other offer: 148,60; 343,480; 397,770; 516,680; total 1,405,990.

The COURT.—Very well—the same ruling.

(Witness excused.)

Testimony of W. G. Weigle, for Defendants.

W. G. WEIGLE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. RUSTGARD.)

Q. What is your full name? A. W. G. Weigle.

Q. What is your occupation?

A. Forestry supervisor.

Q. How long have you been in the Forest Service?

A. Since 1902.

Q. Before that what occupation did you follow?

A. I followed different occupations.

Q. Did you have anything before that to do with logging and sawing mills?

A. I worked in the woods more or less every year; before that worked on the farm most of the time.

Q. How long have you been in charge of the forest service at this place? A. Since 1911.

(Testimony of W. G. Weigle.)

Q. The various rangers are working under your direction? A. They are.

Q. You are stationed at Ketchikan, Alaska?

A. I am.

Q. Are you familiar with the meaning of the term "mill scale"?

Mr. HELLENTHAL.—I object to that—it is a word that does not need any explanation.

The COURT.—The objection is overruled.

A. I am familiar with it as used by the Forest Service.

Q. What is that meaning?

Q. (By Mr. HELLENTHAL.) Are you familiar with it as used by the sawmills and loggers?

A. I don't know anything [84] about how the loggers might consider that.

Q. (By Mr. HELLENTHAL.) Or the sawmills?

A. It is simply a professional term in our bulletins, etc.

Mr. HELLENTHAL.—Then I object to it as immaterial. The sort of a mill scale that the Forestry Service might use would mean nothing.

The COURT.—I think the question should be confined to what it means as between loggers and millmen.

Q. I will ask you a little more, Mr. Weigle. The term mill scale, is it frequently used in the Forestry Department? A. It is.

Q. And used in your literature?

A. Yes, sir.

Q. In reference to the business of the Forestry

(Testimony of W. G. Weigle.)

Bureau? A. Yes, sir.

Q. In that connection I ask you what does the term "mill scale" import?

Mr. HELLENTHAL.—I object to that as being immaterial because what it means to the Forestry Department is not the question before the Court. It is what it means to the lumber-man and the saw-millman.

The COURT.—The objection is sustained.

The WITNESS.—We also have a dictionary of forest terms—it is in that.

Q. You have issued a dictionary of forest terms?

A. Yes, sir.

Q. And the word is included therein?

A. Yes, sir.

Q. And defined therein? A. Yes, sir.

Q. The definition given there, is that the definition which it is accepted at by the Forestry Bureau?

A. Yes, sir.

Q. What is that definition?

Mr. HELLENTHAL.—I make the same objection.

The COURT.—The objection is sustained, unless this witness knows what it means in the usual acceptation of the term between [85] millmen and loggers. Within those limits I will allow testimony, but I cannot allow testimony as to what it means in relation to a matter that is not before the Court.

Mr. RUSTGARD.—I offer to prove by this witness that the term "mill scale" as used by the Forestry Service as he has testified is as follows: "The tally of the lumber after the logs are run through

(Testimony of G. D. McDonald.)

the mill, tally behind the saw."

Mr. HELLENTHAL.—I object to that.

The COURT.—Objection sustained.

(Witness excused.)

Testimony of G. D. McDonald, in His Own Behalf (Recalled—Cross-examination).

G. D. McDONALD, one of the defendants herein, upon being recalled for cross-examination, having been previously duly sworn, testified as follows:

Cross-examination.

(By Mr. HELLENTHAL.)

Q. I hand you a letter dated February 21, 1916, that was shortly before that towing was done, was it not—is that letter written by you and signed by you?

A. I don't know; some of it is written in pencil, and some of these words are somewhat blotted.

Q. Is that your signature?

A. It is from what I know at the present time, yes.

Q. Written on your letter-head?

A. Yes, it is written on our letter-head.

Q. And your handwriting?

A. It appears to be.

Q. I offer that in connection with the cross-examination of this witness.

Mr. RUSTGARD.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit "S," and copy hereto attached.) [86]

Q. Were you present at the time the boom was

(Testimony of G. D. McDonald.)

made up at Duncan Canal when it had gone to pieces?

A. Yes, sir, I was there myself.

Q. You kept actual tally of that time?

A. Yes.

Q. And the number of men there?

A. Yes, sir.

Q. You testified of your own knowledge in that regard? A. Yes.

Mr. RUSTGARD (to Mr. Worthen).—I was going to inquire from you in regard to your testimony. I think it was to the effect that in 1917 you were short of logs, and you sawed them up just as fast as you got them. That was your testimony, wasn't it?

Mr. WORTHEN.—I don't recall being asked that, but that was pretty nearly the fact.

(Questions by the COURT.)

Q. Where are all these logs now?

A. Cut up and distributed.

Q. When were they cut up? A. Last summer.

Q. The last boom under the 1917 contract was scaled July 15th, was it not?

A. I think something like that.

Q. Now, when was the timber sawed into lumber—when did it go through the mill?

A. You mean the exact date?

Q. No, approximately. What was the custom when logs would come in?

A. It depends on how many we have on hand. If we have a lot of logs we take them up into the upper bay—

Q. What is the average—

(Testimony of G. D. McDonald.)

A. The average—sometimes it is a week; sometimes it is six months.

Q. Have you no recollection about these logs?

A. I think these logs were finally all sawed up before the first of September.

Q. Have you no recollection as to when you received the last raft on July 15th what had become of the logs before that? [87]

A. With the exception of that one boom they had been sawed up during the summer; we had one boom up on the tide flats at Price's Point.

The COURT.—That is all.

(Witness excused.) [88]

Testimony of Allen Fortney, for Plaintiff.

ALLEN FORTNEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. What is your name? A. Allen Fortney.

Q. Do you know Mr. Stevenson? A. Yes, sir.

Q. Did you ever work in connection with Mr. Stevenson scaling logs? A. Yes, sir.

Q. I hand you here a scale-book, which scale-book contains some exhibits introduced in this case, and ask you whose writing that is.

A. That is my writing.

Q. Did you correctly put down the figures as they were given to you by Mr. Stevenson?

A. Yes, sir.

(Testimony of Allen Fortney.)

Q. And you know that your figures contained in that book are accurate, as Mr. Stevenson gave them to you? A. Yes, sir.

Cross-examination.

(By Mr. RUSTGARD.)

Q. How old are you, Allen? A. 17.

Q. What grade are you in in school?

A. Eighth grade.

Q. How many rafts did you help Stevenson to scale?

A. I don't know—I couldn't answer that question.

Q. Is all the writing in that book your handwriting? A. Not all of it.

Q. How much of it—approximately half of it?

A. I couldn't say.

Q. Just look at it please and tell us approximately how much of that book is in your handwriting.

Mr. HELLENTHAL.—It is clearly distinguishable which is and which is not.

Q. Is the writing on page 10 your writing?

A. No, sir.

Q. Is the writing on page 18 your writing?

A. No, sir.

Q. Is the writing on page 26 your writing?

A. Some of it.

Q. Whose is the other? A. This here? [89]

Q. Yes. A. Mr. Stevenson's.

Q. Which is Stevenson's and which is yours?

A. This is Mr. Stevenson's and this is mine (indicating).

(Testimony of Allen Fortney.)

Q. Part of the first column is Stevenson's and part of the third and fourth columns is yours?

A. This here is Mr. Stevenson's; I started in here.

Q. Then about two-thirds of the first two columns to the left is Stevenson's handwriting, and the rest of it is yours, on that page? A. Yes, sir.

Q. How is 38—is that yours? A. Yes, sir.

Q. How about 44? A. That is mine.

Q. Those crosses in front of some of the figures, are they yours? A. Yes, sir.

Q. What do they stand for?

A. Stand for a single log.

Q. What are these brackets?

A. Stands for one log cut into two parts.

Q. I call your attention to the figures in the third column from the left,—I call your attention particularly to page 38—that is your handwriting on page 38? A. Yes, sir.

Q. Those figures in the third column from the left, did you put them down? A. Yes, sir.

Q. What time did you put those down? At the time you were scaling? A. Yes, sir.

Q. Do you know what they stand for?

A. This here one stands for—S, split, and 4 stands for ¼—¼ was split.

The case was then argued to the jury after which the Court instructed the jury as follows: [90]

Instructions of Court to Jury.

GENTLEMEN OF THE JURY:

(1)

If everybody in this world knew exactly what he

was entitled to and did not want any more than what he is entitled to, and if everybody in this world knew just what he owed and was willing to pay every cent he owed and to fulfill every other obligation, there would be no use for courts nor juries nor lawyers—the world would be a pretty nice place to live in; but it is because some people do not always know just what they are entitled to, and sometimes because although they know it, yet they want more than they are entitled to; and it is because some people do not always know just what they owe and at other times although they know what they owe, yet they do not want to pay the full amount they owe, that courts are set up and juries and lawyers come into existence.

In setting up courts the State has determined that on all questions of fact the jury are the judges; it has also determined that the question as to what shall go to a jury the Judge shall determine. That may not be wise, but that is our system of jurisprudence. Nine times out of ten whatever the jury decides as to the facts, the losing party considers that he has gotten the worst of it, and quite often that he has gotten the worst of it through some ignorance or dishonesty; the same with the Court and the Judge—no matter what the Judge decides as to the law, the losing party quite often considers that he has gotten the worst of it through the ignorance or dishonesty of the Court; but if the jury is composed of men of average common sense and experience, and the court is composed of a Judge or Judges of average common sense and experience, neither the Court nor the jury

will pay the slightest attention to any such idea that may be in the mind of the losing party—just simply expects it and puts it down, as one of the incidents of the life of a man who has anything to decide affecting the rights of other people. [91]

It is under this scheme of jurisprudence that the Court has to tell the jury what there is before it to decide. Sometimes the Court tells the jury that under the evidence in the case there is nothing for them to decide—takes the case entirely away from the jury, because under the law and the evidence there is nothing for the jury to decide. In other cases the Court narrows the issues down from the evidence and submits to the jury what is to be decided under the evidence and the law in the case.

I am saying this to you, gentlemen, simply to impress upon you the high nature of your duties and of mine—and of how we must hew to the line, you performing your functions and I mine, without fear of criticism or hope of commendation.

(2)

Now, this case has become narrowed in the issues that are to be submitted to this jury,—narrowed by the pleadings and the evidence—more by the evidence than by the pleadings. The pleadings are the papers on which the suit is founded, the complaint, answer and reply that are made—they are called the pleadings in the case. The evidence you have heard before you,—the pleadings you take with you to the jury-room. The complaint in this case is to be taken in connection with the bill of particulars that has been called for by the defendant and furnished by

the plaintiff, and filed in the case. The complaint, then, is not only the original complaint, but the complaint as amplified by the bill of particulars which will be submitted to you along with the complaint.

(3)

Now, this is a suit, in its form, on an open account —the evidence in the case shows that it is not strictly an open account, but that the indebtedness divides itself into two periods [92] of time covered by two alleged contracts, respectively, according to the plaintiff's presentation of the case.

(4)

What was due under the first contract? Plaintiff claims a certain amount of money due to him under a contract dated March 27, 1916 (which is Plaintiff's Exhibit "A"), and the evidence shows that plaintiff claims that there is a certain other sum due to him under and by virtue of the contract of March 4, 1917 (Plaintiff's Exhibit "B"). The defendant by his testimony contends that this contract of March 27, 1916, was never in force, that nothing was done under it. Now, whether anything was done under it or not is absolutely immaterial in this case for the reason that the plaintiff, by his bill of particulars, shows that there is nothing due under that contract. I am talking now, when I say nothing due under the contract and that it is absolutely immaterial in the case, about the question of how much timber was delivered under the contract and the amount due thereunder. I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered

under that contract have been fully paid for, with the exception of $74.42; consequently there is nothing coming to the Worthen Company, the plaintiff, for logs delivered under the first contract. On the contrary, there is $74.42 due to Schenk and McDonald, the defendants, under that first contract. In other words, there can be no claim against Schenk and McDonald under the first contract, whether anything was or was not done under it.

(5)

Now, we come to the second contract. That contract is admitted in the evidence in the case. It is admitted that that contract was entered into and that logs were delivered thereunder. [93] That being the case you will determine from the evidence the number of thousand feet of lumber that were delivered under the contract—calculate it according to the mill scale—take the mill figures for it—and you will multiply that sum by $6.50 (a thousand). Then you will ascertain from the evidence what amount has been paid and advanced by plaintiff for and on account of that contract. Now, the remainder would be the sum due to plaintiff if the defendant has not established any defense or counterclaim. Well, the defendants do set up some defenses and counterclaims. They set up as a first counterclaim that they had a contract with plaintiff under which they claim they delivered some logs and that there is money due them thereunder. There is no evidence of any contract for the delivery of logs as set up in this first counterclaim; consequently that counterclaim is entirely withdrawn from your consideration.

(6)

The defendant sets up a second counterclaim. The second counterclaim reads as follows: "that on and between June 24, 1916, and the 16th day of September, 1916, defendants furnished to plaintiff at the latter's instance and request the use of a tow-boat with a crew, for periods aggregating 172 hours; that the same was actually and reasonably worth the sum of $5 per hour, totaling $860.00."

Now, plaintiff says that so far as that job of towing is concerned, the agreement was that the defendants would charge simply the actual cost of it. Now, it is for you to determine what the agreement was as to that job of towing—whether it was to be paid for at its reasonable worth and value as things go, the going price of things in the market and customs of men engaged in that class of business—or whether it was to be the [94] actual cost. If you decide that plaintiff agreed to pay just simply the cost, why then you will determine what the cost was and allow that as a deduction from whatever sum you may find to be due to plaintiff under this second contract; but if you find that the contract was for reasonable worth and value of those services, then you determine what the reasonable worth and value of those services was and deduct that sum. That is a matter entirely for you to determine from the evidence in the case. If you find it was to be the reasonable worth and value, you should find from the evidence how many hours were occupied in said job, and what is the reasonable worth and value per hour.

(7)

You will find set up in the answer a third counterclaim which is a counterclaim similar to the first counterclaim, and the Court gives you the same instruction as to that counterclaim that it gave you as to the first counterclaim—that is to say, there is no evidence whatsoever to support it, and the said counterclaim is entirely withdrawn from your consideration.

(8)

Then the defendant sets up another counterclaim and that is known as the fourth counterclaim, which reads as follows: "That during the month of July and August, 1917, defendants loaned to plaintiff 72 boom chains and 3 piling chains which plaintiff agreed either to return to defendants or pay for at their value. That plaintiff has neglected and refused to return the said chains and that the actual and reasonable value of said boom chains is $3 for each or the total of $216, and the value of the said piling chains is $7.50 for each, or the total of $22.50."

Now, you are to consider whether or not there are any boom chains or piling chains that plaintiff owes the defendant for by virtue of the fact that plaintiff did not return them or [95] did not pay for them. If so, determine from your recollection of the evidence how many boom chains and how many piling chains, and allow defendants such sum as you may find is the reasonable worth and value of same, and deduct that sum also from whatever sum you may find is due the plaintiff under this second contract.

(9)

Then the defendant has set forth another counterclaim known as the fifth counterclaim, which is as follows: "That on the 15th day of September, A. D. 1916, at plaintiff's special instance and request and for its benefit, defendants furnished six workmen for re-booming a raft of logs at Duncan Canal, Alaska, which work continued for a period of nine hours, making a total of fifty-four hours. That the same was actually and reasonably worth and of the value of 50 cents per hour or a total of $27, and that no part of the same has ever been paid." It is for you to determine whether or not such services were rendered, and if so what the value was, and if in your opinion of the evidence they were rendered and have not been paid for it is a legitimate charge against the plaintiff and should also be deducted.

(10)

In other words, gentlemen, the credits that should be made to the defendant in this case—credits, I mean, to be made on the balance due under second contract—are, 1st, the $74.42 that he has not been paid under that first contract; 2d, the towing-boat and crew charges, if you find that anything is due under that; 3d, the boom chains and piling chain charges, if you find anything is due under that; 4th, the amount, if any, that is due for the workmen, as set forth in the fifth counterclaim.

(11)

Your verdict will have to be for the plaintiff, because by [96] a simple matter of calculation you can see that those sums, no matter what is allowed,

would not be sufficient to overcome the difference between the amounts advanced and paid by Worthen under the second contract and the value of the logs furnished by defendants, according to the mill scale.

(12)

Now, I am going to ask you to answer some questions so that if there should be any error of law in this case the Court may, if possible, know just where it is and how it affects the case. The questions I want you to answer are as follows:

Question No. 1. What sum, if any, do you find should be allowed to the credit of defendant for and on account of the use of the towboat and crew mentioned in the second counterclaim set up by defendant in the answer?

Question No. 2. What sum, if any, do you find should be allowed to the credit of defendant for and on account of the boom chains and piling chains mentioned in the fourth counterclaim set up by defendant in the answer?

Question No. 3. What sum, if any, do you find should be allowed to credit of defendant for the six workmen mentioned in the fifth counterclaim set up by defendant in the answer?

And the general verdict—"We, the jury, duly empanelled and sworn in the above-entitled cause, find for the plaintiff, and assess its recovery at" whatever sum you may find is due.

(13)

Gentlemen of the Jury, the Court has not meant by anything that has been said or has appeared in this case to influence your verdict in any way whatso-

ever, nor should you consider anything in the nature of a rebuke to any of the counsel or parties to the suit as at all affecting its merits. This is a lawsuit between [97] two citizens, each contending for what he considers is his rights, and you should decide it without fear or favor to either side. You are trying a lawsuit between these two citizens, the rights or wrongs of whose position are determined by the law and by the evidence produced upon the witness-stand.

You are the sole judges of the credibility of the witnesses and the weight of the testimony, and neither the opinion of the Court, nor counsel, nor anyone else should have any influence whatsoever in your deliberations unless it concurs with your own unbiased opinion. You are to decide the case according to the evidence as produced upon the witness-stand under the instructions of the Court as to the issues. Statements of counsel are not evidence. It is meet and proper that counsel should argue the case before you and give you their views of the evidence and of the conclusions which they think are warranted from that evidence, but in the last analysis it is your recollection of what the testimony was, and it is your judgment of what conclusions and inferences ought to be drawn from that testimony, that must govern. In this sphere you are entirely independent of the opinion of any man.

You make up your minds which witnesses are to be believed when they testify in court much the same as you do when they tell you a story outside of court—you size up the witness—you observe his appearance and demeanor—you consider the intelli-

gence of the witness, and his opportunity to know of the truth of things testified to—you note whether or not the witness is fair and frank and straightforward, or weak, shuffling and evasive—whether a disposition has been shown to tell the truth and the whole truth about the matters to which the witness testified—you consider the reasonableness or unreasonableness of the [98] testimony—you consider how the witness stood cross-examination; you consider what interest the witness has in the story told and whether or not that interest has colored the testimony, and if so, to what extent; and from all of the facts and circumstances appearing in the case make up your minds whom to believe. You would not magnify trifles nor minimize things of importance, but should accord to each piece of evidence the importance which you think it deserves in the scheme of events you are considering. If you believe that any witness has wilfully testified falsely as to any material issue or matter in relation to this case you are at liberty to disregard that witness' entire testimony except insofar as it may be corroborated by other witnesses or circumstances which you do believe.

Exceptions of Defendant to Instructions of Court to Jury.

And thereupon and before the jury retired the defendant excepted to the Court's instructions as follows:

Mr. RUSTGARD.—I except to this portion of the Court's instructions "whether anything was done under it," referring to the contract of March 27th,

1916, "or not is absolutely immaterial in this case." I also take exception to the following portion of the Court's instructions, "it is absolutely immaterial in the case about the question of how much timber was delivered under the contract and the due thereunder," referring to the contract of March 27, 1916.

I also except to the following portion of the Court's instructions: "I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered under that contract have been fully paid for, with the exception of $74.42." [99]

I especially make these exceptions because there is evidence in the case tending to show that the payments which were made during the year 1916 by plaintiff to defendant were made upon a different transaction from the one testified to by plaintiff's witnesses.

I also except to the following portion of the Court's instructions: "Now, we come to the second contract. That contract is admitted in the evidence in the case. It is admitted that that contract was entered into and that logs were delivered thereunder. That being the case you will determine from the evidence the number of thousand feet of lumber that were delivered under the contract—calculate it according to the mill scale—take the mill figures for it." My exception is based upon the fact that there is nothing in the evidence to show what is meant by the term "mill scale," but the evidence shows the term mill scale is indefinite and uncertain, and has no definite or certain meaning.

I also except to the following portion of the Court's instructions: "There is no evidence of any contract for the delivery of logs as set up in this first counterclaim; consequently that counterclaim is entirely withdrawn from your consideration."

I also except to all of section 7 of the Court's instructions.

The jury thereupon retired for deliberation and subsequently returned with their verdict and special findings as filed. After the judgment had been filed the following proceedings with reference to taxation of costs were had:

On March 25th after entry of judgment plaintiff filed his bill of costs as of record. On April 1st objection was filed to bill of cost by defendant as shown by the records. On April 2d the United States Marshal filed additional certificate of costs, in words and figures as follows, to wit: [100]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

SCHENK & McDONALD,

Defendants.

Certificate of U. S. Marshal Re Costs.

THIS IS TO CERTIFY that the plaintiff paid the United States Marshal's Office as costs in the above-entitled case, accruing up to date of judgment,

without any reference to costs accruing since that date, the sum of Ten Hundred Sixty-six and 17/100 Dollars ($1066.17) expended in connection with care and custody of attached property and other Marshal's fees in connection with this case, prior to the date of the judgment, as follows:

Marshal's expenses in serving Writ of Attachment $96.17
Keeper's fee 970.00

Dated at Juneau, Alaska, April 2, 1918.

For U. S. Marshal,

W. W. CASEY, Jr.,
Chief Deputy.

That prior to the filing of the certificate last above quoted there were no certificates of marshal's fees, expenses or other costs filed except the certificates attached to the summons and the writ of attachment respectively, which certificates were in words and figures as follows, to wit:

United States of America,
Territory of Alaska,
Division Number One,—ss.

I HEREBY CERTIFY that I served the within sumons on the 6th day of September, 1917, at Juneau, Alaska, and that I served the same on the 7th day of September at Petersberg, Alaska, by handing to and leaving with the within-named defendants, Gordon D. McDonald and [101] Edward Schenk, as individuals, a certified copy of the original writ herein, together with the complaint in the within entitled action, and I also certify that I served a certified copy of the original writ, together with the

complaint in the within entitled action on Edward Schenk for service on the copartnership of Schenk & McDonald, said service made personally.

Marshal's fee, $9.00.

Paid by S. Hellenthal, Atty.

Dated at Juneau, Alaska, September 18, 1917.

J. M. TANNER,
U. S. Marshal.
By J. L. Manning,
Office Deputy.

United States of America,
Territory of Alaska,
Division Number One,—ss.

I HEREBY CERTIFY that I received the within writ of attachment on the 6th day of September, 1917, at Juneau, Alaska, and that I served the same on the 7th day of September, 1917, at Portage Bay, Alaska, by levying on a certain boom of logs, said boom of logs containing 181 pieces and which was scaled by Forest Ranger James Allen on September 6, 1917, and said to contain 394,650 feet and further certify that I did take possession of same and place a keeper in charge of said logs.

Marshal's fee.....$3.00
Expenses 87.16

Paid by S. Hellenthal, Attorney.

Dated at Juneau, Alaska, September 19, 1917.

J. M. TANNER,
Marshal.
By J. L. Manning,
Office Deputy. [102]

Filed in District Court, District of Alaska, First Division, September 21, 1917. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

That thereafter on the 2d day of April, 1918, the clerk overruled defendant's objection to the cost bill and taxed the cost as demanded by plaintiff and in making such taxation allowed marshal's fees at $1,066.17. That thereafter and on the 3d day of April, 1918, defendant appealed to the District Court from the clerk's allowance and taxation of costs as of record; that said appeal was thereafter and on the 3d day of April, 1918, submitted to the District Court of the Territory of Alaska, First Division; that thereafter and on the 4th day of April, 1918, the Judge of said District Court instructed plaintiff to file a certified statement of the marshal's fees taxed by the clerk and serve a copy thereof on attorney for defendant, which order was oral and not reduced to writing but was subsequently and on the 4th day of April complied with; that thereafter the said District Court, after hearing counsel for both plaintiff and defendant, affirmed the taxation of cost made by the clerk of court and the allowance of the marshal's fee at $1,066.17. [103]

Plaintiff's Exhibit "A"—Log Contract, March 27, 1916, Between Gordon McDonald and Worthen Lumber Mills.

LOG CONTRACT.

THIS AGREEMENT made and entered into this 27th day of March, 1916, by and between Gordon McDonald, party of the first part, and Worthen Lum-

ber Mills, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar to him in hand paid by the party of the second part and the further considerations hereinafter specified, agrees to furnish and deliver to the said party of the second part at time and place as hereinafter specified One Million, more or less feet of first-class merchantable logs, spruce and cedar. Said logs shall be sound and straight grained, free from doty spots and dry rot, wind and heart shakes and checks, and shall be smooth trimmed. They shall not exceed sixty inches in diameter at the large end. They shall be safely and securely boomed with good chains and swifters and the booms shall be in sections of not to exceed One Hundred Thousand Feet in each Section, and the width of the boom not to exceed Thirty-five Feet. The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale. The said logs shall be cut at North end Prince of Wales Island, Alaska under the terms and conditions required by the Forest Reserve regulations, and shall be placed in the waters of the sea, in the inlet or bay contiguous to the place where cut, in a safe and accessible place for the tugboat to reach when ready to tow, said place not to exceed 175 miles distant from the mill at Juneau of said company by the ordinary route of water travel.

IT IS FURTHER AGREED that the price to be paid for said logs shall be Six Dollars ($6.00) per

thousand feet, free of all taxes and stumpage, which are to be paid *by the first part,* payable at the mill of said second party, the towing of said logs to be by and at the cost of the said second party. The said second party agrees to advance the money required for stumpage, which [104] amount so advanced shall be a lien on said logs, and shall be deducted from the purchase price of said logs.

IT IS FURTHER EXPRESSLY AGREED that said second party shall have a lien on all logs cut by the party of the first part for any and all sums, goods or merchandise advanced said first party for the carrying out on his part of this contract, or otherwise advanced.

In settlement for any boom of logs, or any logs furnished by said party of the first part under this contract, or any logs sold by said first party to said second party, the amount of any and all advances made by the party of the second part to the party of the first part, or for his account, shall first be deducted; and in case the party of the first part fails to deliver and furnish sufficient logs to repay such advances the party of the first part hereby agrees to pay to said party of the second part the amount due and owing by reason of such advances. This contract is not assignable by either party.

IT IS FURTHER AGREED that said logs shall be cut, properly boomed and lodged in a safe and secure but accessible place and ready for towing as follows: as soon as possible but not later than Sept. 1st, 1916. Each boom of logs shall be scaled by the

party of the first part and this scale shall be sent to party of the second part for purpose of comparison with number of pieces in boom: and said logs shall be considered delivered when, and in such amounts as, taken in tow by the tugboat of the said second party.

And the first party agrees to notify the party of the second part at its place of business in Juneau when any boom is ready for towing.

AND IT IS FURTHER AGREED that in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. It is further agreed that party of the first part shall furnish a boat of at least 50 horse power to assist in towing said logs as far as Petersburg, Alaska, cost of said assistance included in above price of logs.

IN WITNESS WHEREOF we have hereunto set our hands and seals the day and year above written at Juneau, District of Alaska.

SCHENK McDONALD LOG CO.

(Signed) By G. D. McDONALD,

Mgr. [105]

Plaintiff's Exhibit "D"—Log Contract, January 4, 1917, Between Edward Schenk and Gordon D. McDonald, Copartners, and Worthen Lumber Mills.

LOG CONTRACT.

This agreement, made and entered into this 4 day of January, 1917, by and between Edward Schenk and Gordon D. McDonald, co-partners party of the

first part, and Worthen Lumber Mills, a corporation duly organized and existing under the laws of the State of Washington, party of the second part, WITNESSETH:

That the said party of the first part for and in consideration of the sum of One Dollar to him in hand paid by the party of the second part and the further considerations hereinafter specified, agrees to furnish and deliver to the said party of the second part at time and place as hereinafter specified three million feet board measure, more or less—feet of first class merchantable logs, spruce, and cedar. Said logs shall be sound and straight grained, free from doty spots and dry rot, wind and heart shakes and checks, and shall be smooth trimmed. They shall not exceed sixty inches in diameter at the large end. They shall be safely and securely boomed with good chains and swifters and the booms shall be in sections of not to exceed One Hundred Thousand Feet in each Section, and the width of the boom not to exceed sixty Feet. The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale. The said logs shall be cut at Portage Bay, Kuprenoff Island, Alaska under the terms and conditions required by the Forest Reserve regulations, and shall be placed in the waters of the sea, in the inlet or bay contiguous to the place where cut, in a safe and accessible place for the tugboat to reach when ready to tow, said place not to exceed 110 miles distant from the mill at Juneau of the said company by the ordinary route of water travel.

IT IS FURTHER AGREED that the price to be paid for said logs shall be Six & 50/100 Dollars ($6.50) per thousand feet, free [106] of all taxes and stumpage, which are to be paid by the first party, payable at the mill of said second party, the towing of said logs to be by and at the cost of said second party. The said second party agrees to advance the money required for stumpage, which amount so advanced shall be a lien on said logs, and shall be deducted from the purchase price of said logs.

IT IS FURTHER EXPRESSLY AGREED that said second party shall have a lien on all logs cut by the party of the first part for any and all sums, goods or merchandise advanced said first party for the carrying out on his part of this contract, or otherwise advanced.

In settlement for any boom of logs, or any logs furnished by said party of the first part under this contract, or any logs sold by said first party to said second party, the amount of any and all advances made by the party of the second part to the party of the first part, or for his account, shall first be deducted; and in case the party of the first part fails to deliver and furnish sufficient logs to repay such advances the party of the first part hereby agrees to pay to said party of the second part the amount due and owing by reason of such advances.

IT IS FURTHER AGREED that said logs shall be cut, properly boomed and lodged in a safe and secure but accessible place and ready for towing as follows: First Boom by March 1st, 1917, last boom

by the first day of July, 1917, Booms to contain not over 350,000 nor less than 250,000 each and it is agreed that the party of the first part will not sell or deliver any logs from said bay to any person or corporation except the second party.

And said logs shall be considered delivered when, and in such amounts as, taken in tow by the tug-boat of said second party.

And the first party agrees to notify the party of the second part at its place of business in Juneau when any boom is ready for towing.

AND IT IS FURTHER AGREED that in case of dispute over scale the scale of a competent, disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery 34 ft. logs shall be scaled as 32 ft. long.

In Witness Whereof we have hereunto set our hands and seals the day and year above written at Juneau, District of Alaska.

EDWARD SCHENK and
GORDON D. McDONALD.
By G. D. McDONALD.
WORTHEN LUMBER MILLS.
H. S. WORTHEN,
Treas. [107]

(In exhibits "A" and "D" the parts underscored are in typewriting, the remainder is printed, except the signatures, which are in writing.) [108]

Plaintiff's Exhibit "S"—Letter, February 21, 1916, Schenck & McDonald Log Co. to Worthen Lumber Mills.

(Letterhead, Schenk-McDonald Logging Company.)

February 21, 1916.

Worthen Lumber Mills,
Juneau, Alaska.

Mr. Worthen, Dear Sir:

Your letter of February 4 at hand and will say that we will be willing to meet you half way on any proposition you want to take up on getting logs on Kenui Island but will have to move quick as Mr. George E. James is looking for timber in that location. We have several bunches of timber in sight down there and if you can use it we will make the use of our new tug boat to you for just what it costs to operate it. I think that is very fair, she is about the same power as your own boat and as to the booms we will make them any way you want them made up, any width or any length. We will expect you to advance the stumpage. This timber is the best I know of anywhere and if you want it you will have to hurry to beat the other party.

Let me know by return mail and I will apply for the sale.

Yours truly,
SCHENK McDONALD LOG COMPANY.
By G. D. McDONALD,
Manager. [109]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Order Settling and Approving Bill of Exceptions.

The foregoing and hereto attached bill of exceptions has been examined by me and found to be full, true and correct and to contain all the evidence adduced and proceedings had at the trial of the above-entitled cause except, however, such evidence as relates solely to the second, fourth and fifth counterclaim of defendants, and it also contains a true and correct statement of the proceedings had in this court touching the taxation of costs, and it is hereby settled, signed and filed as the bill of exceptions in the above-entitled cause.

Done in open court this 10th day of June, 1918.

ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska, One Division. Jun. 10, 1918. J. W. Bell, Clerk. By ————, Deputy. [110]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Verdict.

We, the jury duly impaneled and sworn in the above-entitled cause, find for the plaintiff, and assess its recovery at $839.53/100.

JOHN McLOUGHLIN,
Foreman.

Entered Court Journal No. O, page 98.

Filed in the District Court, District of Alaska, First Division. Mar. 18, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [111]

In the District Court for the District of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals.

Defendants.

Judgment.

This matter came on regularly for hearing on March 15th, 1918, the plaintiff appearing by its attorneys, Hellenthal & Hellenthal, and the defendants by their attorney, John Rustgard, Esquire, a jury of twelve persons having been regularly impaneled and sworn to try said action, the parties having presented witnesses and offered testimony, and both parties having introduced all of their testimony and having rested, respective counsel having addressed arguments to the jury, and the Court having instructed the jury; whereupon the jury retired to consider their verdict. And subsequently, on March 18, 1918, returned into court with a verdict signed by its foreman, John McLoughlin, all of said jury having answered to their names and said, after hearing said verdict read, that it was their verdict, which said verdict is in words and figures as follows: [112]

"In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, Composed of EDWARD SCHENK and GORDAN D. McDONALD, and EDWARD SCHENK and GORDAN D. McDONALD, as Individuals,
Defendants.

VERDICT.

The jury duly impaneled and sworn in the above-entitled cause find for the plaintiff, and assesses its recovery at $838.53/100.

(Signed) JOHN McLOUGHLIN,
Foreman.

Entered Court Journal No. O, page 98. Filed March 18, 1918."

And more than three days having expired since giving of said verdict, and no motion for new trial or in arrest of judgment having been filed, and it further appearing to the Court that personal property, consisting of a boom of logs situate at Portage Bay, Kupreanof Island has been attached in this action and has not been sold as perishable property or discharged from the attachment as provided by law;

IT IS ORDERED AND ADJUDGED that the plaintiff, the Worthen Lumber Mills, a corporation, have and recover from said defendants, Schenk & McDonald, a copartnership composed of Edward Schenk and Gordan D. McDonald, and Edward Schenk and Gordan D. McDonald as individuals, the sum of $838.53 and the plaintiff's costs and disbursements incurred in this action, in the sum of $——, taxed by the clerk.

And the Court FURTHER ORDERS AND ADJUDGES that said boom of logs attached in this action, now lying and being at Portage Bay, Kupreanof Island, Alaska, be sold as provided by law to satisfy plaintiff's [113] demands, consisting of the amounts specified herein: Defendant allowed 30 days within which to file proposed bill of exceptions.

Done in open court this 25th day of March, A. D. 1918.

ROBERT W. JENNINGS,
Judge.

Copy received this 23d day of March, 1918.

JOHN RUSTGARD,
Attorney for Defendants.

Entered Court Journal No. O, pages 117, 118.

Filed in the District Court, District of Alaska, First Division. Mar. 25, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [114]

In the District Court for the Territory of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Copartnership,
Defendants.

Objections to Cost Bill.

To the Clerk of the Above-named Court:

Please take notice that the defendants object to and protest against that item in plaintiff's cost bill designated "Marshal's Fees $1,066.17," for the reason that there is nothing of record to show that the marshal's fees are in *access* $99.16, and defendants therefore object to the taxation of more than $99.16 for such fees.

JOHN RUSTGARD,
Attorney for Defendants.

Filed in the District Court, District of Alaska, First Division. Apr. 1, 1918. J. W. Bell, Clerk. By ————, Deputy. [115]

In the District Court of the United States for the District of Alaska, Division No. 1.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership, etc.,
Defendant.

Cost Bill.

Statement of disbursements claimed in the above-entitled cause, viz.:

Clerk's Fees		$ 12.00
Marshal's Fees		1,066.17
Trial Fee		12.00
Costs in Lower Court		
Advertising		
Depositions		
Attorney's Fees		20.00
Attorney's Fee for taking —— depositions, at —— each		
Master's Fees		
Referee's Fee		
Disbursements		
Witness Fees:		
John Stevenson	Mch. 15–16–18..	9.00
Allen Fortney	" 16..	3.00
Robt. Kennedy	16..	3.00
Mat. Noedness	18..	3.00
Total		$1,128.17/100

Filed in the District Court, District of Alaska, First Division. Mar. 25, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[116]**

United States of America,
Territory of Alaska,
Division No. 1,—ss.

I, Simon Hellenthal, being duly sworn, say I am the attorney for plaintiff in the above-entitled cause; that the costs and disbursements set forth above have been necessarily incurred in the prosecution of this suit, and that plaintiff is entitled to recover the same from the defendants.

SIMON HELLENTHAL.

Subscribed and sworn to before me, this 25th Mch., 1918.

[Court Seal] C. Z. DENNY,
Deputy Clerk of District Court, Dist. of Alaska, Division No. 1.

Costs taxed at $1,128.17 this 2d day of April, 1918.

J. W. BELL,
Clerk.

In the District Court for the Territory of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK and McDONALD, a Partnership,
Defendants.

Notice of Appeal from Taxation of Costs.

To the Above-named Plaintiff and Its Attorneys, Hellenthal & Hellenthal.

Take notice that the defendants appeal to the Court from the decision of the clerk of court taxing as costs the sum of $1,066.17 for marshal's fees, and from the taxing as costs any sum for marshal's fees in *access* of $99.16.

JOHN RUSTGARD,
Attorney for Defendant.

Copy of the foregoing notice received this 3d day of April, 1918.

J. A. HELLENTHAL,
Atty. for Plff.

Filed in the District Court, District of Alaska, First Division. Apr. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [117]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

Case No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Order Affirming Taxation of Costs by Clerk.

This matter coming on to be heard upon an appeal on the part of the defendants from an order of the clerk taxing the costs that had accrued up to the date of the judgment at $1,066.17, and the plaintiff having filed and presented to the Court an itemized statement, duly certified to by the United States Marshal, of the amount of all the costs of the U. S. Marshal so taxed, which said statement had been previously served on counsel for the defendant, and both parties being present by counsel and no objection being made to any of the items contained in said itemized statement, the Court finds that said costs were properly taxed and affirms the order of the clerk, and orders that the costs herein up to the date of the judgment be and the same are taxed in the manner previously taxed by the clerk, that is to say, in the amount of $1,128.17.

Done in open court this 3d day of April, 1918.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. O, page 141.

Copy received.

JNO. RUSTGARD.

Filed in the District Court, District of Alaska, First Division. Apr. 3, 1918. J. W .Bell, Clerk. By C. Z. Denny, Deputy. [118]

Department of Justice,
United States Marshal's Office,
First Division, District of Alaska.

In the United States District Court for the District of Alaska, Division No. One.

No. 1669–A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

SCHENK & McDONALD,

Defendants.

Certificate of U. S. Marshal Re Costs.

This is to certify that the plaintiff paid to the United States marshal's office, as costs in the above-entitled case, accruing up to the date of the judgment, without any reference to costs accruing since that date, the sum of ten hundred sixty-six and 17/100 dollars ($1,066.17), expended in connection with the care and custody of attached property and other marshal's fees, in connection with this cause, prior to the date of the judgment herein, as follows:

Marshal's expenses in serving writ of attachment	$ 96.17
Keeper's fees	970.00
Total	$1,066.17

Dated at Juneau, Alaska, April 2, 1918.

For the United States Marshal,

W. W. CASEY, Jr.,

Chief Deputy.

Filed in the District Court, District of Alaska, First Division. Apr. 2, 1918. J. W. Bell, Clerk. By ————, Deputy. **[119]**

Department of Justice.
United States Marshal's Office,
First Division, District of Alaska.

Juneau, Alaska, April 3, 1918.

No. 1669-A.

WORTHEN LUMBER MILLS,

Plaintiff,

vs.

SCHENK & McDONALD,

Defendants.

MARSHAL'S COST BILL.

Juneau to Portage Bay—Attachment—90 miles @ 6¢ ($5.40)

Juneau to Petersburg, via Portage Bay—Summons—118 miles @ 6¢ ($7.08)

Actual expense taken as fee in lieu of mileage .....$ 25.00

Hire of launch "Qareta".....$ 25.00

Petersburg to Portage Bay .....28 miles

Portage Bay to Petersburg.....28 miles

56 miles @ 6¢ ($3.36)

Actual expense taken as fee in lieu of mileage	25.00
Hire of launch "Loraine"	
Petersburg to Juneau—2 writs @ 108 miles —216 @ 6¢	12.96
Meals at Petersburg from supper Sept. 7, 1917, to dinner Sept. 13, 1917	12.00
Room at Petersburg Sept. 7 to 12, 1917, both incl	6.00
Meals at Petersburg from supper Sept. 14 to dinner Sept. 15, 1917, incls	2.05
Room at Petersburg Sept. 14, 1917	1.00
Exchange—Check cashed at Bank, Petersburg	.16
Writs served—3 summons @ $3.00	9.00
Attachment served—1 writ	3.00
Keeper's fees from Sept. 13 to 30, 1917, incl. 18 @ $5.00	90.00
Keeper's fees from Oct. 1, 1917, to Oct. 31, 1917, 31 @ $5.00	155.00
Keeper's fees from Nov. 1, 1917, to Nov. 30, 1917, 30 @ $5.00	150.00
Keeper's fees from Dec. 1 to 31, 1917—31 days @ $5.00	155.00
Keeper's fees from Jan. 1 to 31, 1918—31 days @ $5.00	155.00
Keeper's fees from Feb. 1 to 28, 1918—28 days @ $5.00	140.00
Keeper's fees from Mch. 1 to 25, 1918—25 days @ $5.00	125.00
Total	1,066.17

United States of America,
District of Alaska,
Division No. One,—ss.

I, J. M. Tanner, United States Marshal for the 1st Division, District of Alaska, do hereby certify that the foregoing statement of costs in the amount of One Thousand Sixty-six and 17/100 Dollars ($1,066.17), were necessarily incurred by me in [120] the case of Worthen Lumber Mills vs. Schenk & McDonald, Court No. 1669–A, that all the expenses incurred are reasonable and in the amount usually paid for such services, and that I have been fully compensated for same by the plaintiff in the within entitled cause. That the foregoing statement is in full for all costs incurred up to and inclusive of the date of judgment, March 25, 1918, and does not include any costs since the date aforesaid.

(Signed) J. M. TANNER,
United States Marshal.

Filed in the District Court, District of Alaska, First Division. Apr. 3, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [121]

In the District Court for the Territory of Alaska, Div. No. 1, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Assignment of Errors.

Come now the above-named defendants and assign the following errors as having been committed by the District Court of Division Number One, District of Alaska, at Juneau, in the proceedings in the above-entitled cause upon which the defendants below, the plaintiffs in error, intend and do rely in prosecuting their writ of error herein:

I.

The Court erred in holding and ruling that the scale of logs made by plaintiff below was binding on both parties to the action and in holding and deciding that it was immaterial what the true scale of the logs involved was.

II.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below

to witness McDonald, to wit: "Did you see the term 'mill scale' used or hear it used before the time it was used in the contracts here?"

III.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below to witness McDonald, to wit: "At the time this contract was signed did you have any talk with Mr. Worthen as to what interpretation was to be placed upon it (the term 'mill scale')?" [122]

IV.

The Court erred in sustaining plaintiff's objection to the question of defendants below put to witness McDonald, to wit: "Mr. McDonald, do you know what is meant by 'mill scale'?"

V.

The Court erred in sustaining plaintiff's objection to the following question by defendants below to witness McDonald, to wit: "Did you have any discussion with Worthen at the time of the signing of this contract what it (the term 'mill scale') meant?"

VI.

The Court erred in sustaining plaintiff's objection to the following question asked by defendants below of witness Allen, to wit: "Counting spruce and hemlock together, what did that (the Duncan Canal raft) scale?"

VII.

The Court erred in sustaining plaintiffs objection to the following question put to witness Allen by defendants below, to wit: "Now, then, what did you

find that raft from Duncan Canal to contain in board measure?"

VIII.

The Court erred in sustaining plaintiff's objection to the following offer of defendants below, to wit: "I offer to prove by this witness that the raft in question contained 516,680 board ft. measure after all bad logs or defective logs or defective parts of logs had been excluded from the count by the ranger."

IX.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Allen by the defendants below, to wit: "I ask you now, Mr. Allen, to state what that raft (No. 1, 1917) contained in board measure excluding 2 feet on all 34 ft. logs which were scaled as such." [123]

X.

The Court erred in sustaining plaintiff's objection to the following offer made by defendants below, to wit: "I offer to prove by this witness that on behalf of the Government as a forest ranger he (James Allen) scaled the ten rafts at Portage Bay before they were delivered to the Worthen Lumber Mills, that they are the same rafts which McDonald has testified that he, McDonald, did at that place deliver to the Worthen Lumber Mills, and that the scale was as follows: 281,960; 268,080; 219,220; 217,280; 230,870; 230,930; 314,970; 273,590; 273,320; 359,860: total, 2,670,080; and that this is the scale after all bad logs, splits, shakes and discounts of 2 feet on each 34 foot log had been eliminated."

XI.

The Court erred in sustaining plaintiff's objection to the following offer of defendants below, to wit: "Before I dismiss this witness, your Honor, I wish to make the offer further to prove by other witnesses that the actual scale made by this witness of these rafts was a correct scale of the actual board feet contained in the rafts."

XII.

The Court erred in sustaining plaintiff's objection to the following offer made by defendants below, to wit: "I offer to prove by this witness (James Allen) that he scaled the rafts which McDonald has testified he delivered to the Worthen Lumber Mills at Portage Bay in May, 1916, at Malmsbury June 26th, or in the spring of 1916 and at Duncan Canal. I offer to prove that the scale of those rafts was as follows, after allowing for all [124] defective logs, splits, etc., the same as the other offer: 148,060; 343,480; 397,770; 516,680; total, 1,405,990."

XIII.

The Court erred in sustaining plaintiff's objection to the following question put by defendants below to witness Weigle, to wit: "What is that meaning (of the term 'mill scale' as used by the Forest Service)?"

XIV.

The Court erred in sustaining plaintiff's objection to the following question asked of witness Weigle by defendants below, to wit: "In that connection I ask you what does the term 'mill scale' import?"

XV.

The Court erred in sustaining plaintiff's objection to the following offer by defendants below, to wit:

"I offer to prove by this witness that the term 'mill scale' as used by the Forestry Service as he has testified is as follows: 'the tally of the lumber after the logs are run through the mill, tally behind the saw.' "

XVI.

The Court erred in giving the following instruction to the jury, to wit: "Whether anything was done under it (the contract of March 27, 1916) or not is absolutely immaterial in this case."

XVII.

The Court erred in instructing the jury as follows, to wit: "I say that has nothing to do with the case now because the bill of particulars shows that whatever logs were delivered under that contract have been fully paid for with the exception of $74.42."

XVIII.

The Court erred in sustaining the order and judgment of the Clerk of the Court in taxing as costs marshal's fees at $1,066.17 and [125] in taxing any marshal's fees as costs over and above the sum of $96.17.

XIX.

The Court erred in entering judgment in favor of plaintiff and against the defendants below.

WHEREFORE defendants below, these plaintiffs in error, pray that the judgment herein entered on the 25th day of March, 1918, be reversed.

JOHN RUSTGARD,

Attorneys for Defendants Below and Plaintiffs in Error.

Filed in the District Court, District of Alaska, First Division. Jun. 14, 1918. J. W. Bell, Clerk. By ————, Deputy. **[126]**

In the District Court for the Territory of Alaska, Div. No. 1, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Petition for Writ of Error.

Edward Schenk and Gordon D. McDonald, copartners as Schenk & McDonald, the defendants above named, feeling aggrieved by the decision and judgment given and rendered herein in favor of plaintiff and against the defendants, and each of them, on the 25th day of March, 1918, hereby respectfully pray the Honorable Court that a writ of error issue from the United States Circuit Court of Appeals for the Ninth Circuit to the District Court for the Territory of Alaska, Division Number One, and that said writ

of error be heard by said Circuit Court of Appeals at Seattle, Washington.

JOHN RUSTGARD,
Attorney for Plaintiffs in Error.

Now, on this 14th day of June, A. D. 1918, it is hereby ORDERED that the writ of error prayed for issue and that the said cause be heard before the United States Circuit Court of Appeals for the Ninth Circuit at Seattle, in the State of Washington, the defendants to give bond in the sum of $250, conditioned according to law and to be approved by this Court.

Done in open court this 14th day of June, 1918.

ROBERT. W. JENNINGS,
District Judge.

Entered Court Journal No. 0, page 219.

Filed in the District Court, District of Alaska, First Division, Jun. 14, 1918. J. W. Bell, Clerk. By ————, Deputy. **[127]**

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 1669–A.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,
Defendant in Error.

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable the Judge of the District Court of the District of Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said District Court before you between Worthen Lumbers Mills, a corporation, as plaintiff, and Schenk & McDonald as defendants, a manifest error has happened to the great damage of the said defendants Edward E. Schenk and Gordon D. McDonald as is said and appears by their petition herein, we, being willing the error if any hath been done should be duly corrected and full and speedy justice done unto the parties aforesaid in this behalf, do command you if judgment be therein given that then under your seal distinctly and openly you send all the records and proceedings as aforesaid with all things concerning the same to the Judges of the United States Circuit Court of Appeals for the Ninth Circuit in the City of San Francisco, in the State of California, together with this writ, so as to have the same at the said place in the court on the 13th day of July, 1918, that the records and proceedings aforesaid may be inspected and said Circuit Court of Appeals may cause to be done therein to correct these errors what of right and according to the law and custom of the United [128] States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court

of the United States, this 14th day of June, 1918.

Attest my hand and seal of the District Court of the District of Alaska, First Division, on the day and year last above written.

[Seal] J. W. BELL,
Clerk of the District Court for Division Number One, District of Alaska.

Filed in the District Court, District of Alaska, First Division. Jun. 14, 1918. J. W. Bell, Clerk. By ————, Deputy. [129]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,

Defendant in Error.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States of America, to Worthen Lumber Mills, a Corporation, and Hellenthal & Hellenthal, Esqs., Its Attorneys:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San

Francisco, State of California, within thirty days from the date of this citation, pursuant to a writ of error filed in the clerk's office of the District Court for the District of Alaska, First Division, at Juneau, wherein Edward Schenk and Gordon D. McDonald, copartners as Schenk & McDonald, are plaintiffs in error and Worthen Lumber Mills, a corporation, is defendant in error, to show cause, if any there be, why judgment in said writ of error mentioned should not be reversed and speedy justice should not be done to the said Schenk and McDonald and each of them in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 14th day of June, 1918.

ROBERT W. JENNINGS,
Judge of the District Court for the District of Alaska, Division Number One.

[Seal] Attest: J. W. BELL,
Clerk of the District Court for the District of Alaska, Division Number One.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jun. 14, 1918. J. W. Bell, Clerk. By ————, Deputy.

Copy of this citation, assignment of errors and writ of error received this 14th day of June, 1918.

HELLENTHAL & HELLENTHAL,
Attys. for Deft. in Error. [130]

In the United States Circuit Court of Appeals for the Ninth Circuit.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS, a Corporation,

Defendants in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, That we, Edward Schenk and Gordon D. McDonald, copartners as Schenk & McDonald, principals, and B. M. Behrends, as surety, are held and firmly bound unto Worthen Lumber Mills, a corporation, the above-named defendant in error, in the sum of $250 to be paid by the said Schenk & McDonald to the said Worthen Lumber Mills, a corporation, for the payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs and administrators, executors and successors firmly by these presents. Sealed with our seals and dated this 14th day of June, 1918.

The condition of this obligation is such that, whereas the above-named plaintiffs in error and principals in this bond have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment in the above-entitled case by the District Court for the District of

Alaska, First Division, entered herein on the 25th day of March, 1918, in favor of the aforementioned defendant in error and against said aforementioned plaintiffs in error.

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Schenk & McDonald shall prosecute said [131] writ of error to effect and answer all costs and damages if they shall make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EDWARD E. SCHENK.
GORDON D. McDONALD.
By JOHN RUSTGARD,
Their Attorney,
Principals.
B. M. BEHRENDS,
Surety.

United States of America,
Territory of Alaska,—ss.

B. M. Behrends, being first duly sworn, deposes and says that he is the surety above named and as such executed the foregoing bond. That he is a merchant and banker residing at Juneau, Alaska, and is worth at least five hundred dollars over and above his debts and liabilities and property exempt from execution; that he is not a counselor or attorney, marshal, clerk of any court, or other officer of any court.

B. M. BEHRENDS.

Subscribed and sworn to before me this 14th day of June, 1918.

[Notarial Seal] JOHN RUSTGARD,
Notary Public.

My commission expires Sept. 14th, 1918.
Approved June 14/18.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Jun. 14, 1918. J. W. Bell, Clerk. By ————, Deputy. [132]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, as Individuals,
Defendants.

Demand for Bill of Particulars.

To the Above-named Plaintiff and Its Attorneys, Hellenthal and Hellenthal:

The defendants above named respectfully request that they be furnished a bill of the particular items entering into the account referred to in plaintiff's complaint and for which this action is instituted.

JOHN RUSTGARD,
Attorney for Defendants.

True copy of the within received this 10th day of September, 1917, at Juneau, Alaska.

HELLENTHAL & HELLENTHAL,
Attorneys for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Sep. 24, 1917. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [132–A]

In the District Court for the Territory of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff and Defendant in Error,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON D. McDONALD, Individuals,
Defendants and Plaintiffs in Error.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please certify and transmit to the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, the following documents in the above-entitled case, to wit:

1. Complaint.
2. Answer.
3. Reply.

3½ Demand for bill of particulars.

4. Bill of particulars.
5. Bill of exceptions.
6. Verdict.
7. Judgment.
8. Bill of costs.
9. Objections to costs.
10. Clerk's order taxing costs.
11. Notice of appeal from clerk's order taxing costs.
12. Court order affirming taxation of costs.
13. All certificates of costs and expenses by U. S. Marshal.
14. Assignments of error.
15. Petition for writ of error.
16. Order granting writ of error.
17. Writ of error.
18. Original of citation.
19. Bond on appeal.
20. Court's approval of bond on appeal.

Respectfully,

JOHN RUSTGARD,

Attorney for Defendants and Plaintiffs in Error.

[Endorsed]: Filed in the District Court, District of Alaska, First Division. Jun. 25, 1918. J. W. Bell, Clerk. By L. E. Spray, Deputy. **[133]**

In the District Court for the District of Alaska, Division No. 1, at Juneau.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 135 pages of typewritten matter, numbered from one to 133, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe, of the plaintiffs in error, on file herein and made a part hereof, in the cause wherein Schenk & McDonald, a copartnership composed of Edward Schenk and Gordon D. McDonald, and Edward Schenk and Gordon D. McDonald, as individuals, are plaintiffs in error, and Worthen Lumber Mills, a corporation, is defendant in error, No. 1669–A, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to Sixty and 75/100 Dollars ($60.75), has been paid to me by counsel for plaintiff in error.

In witness whereof I have hereunto set my hand

and the seal of the above-entitled court this 1st day of July, 1918.

[Seal] J. W. BELL,
Clerk.

By ——————————,
Deputy.

[Endorsed]: No. 3179. United States Circuit Court of Appeals for the Ninth Circuit. Schenk & McDonald, a Copartnership Composed of Edward Schenk and Gordon D. McDonald, and Edward Schenk and Gordon D. McDonald, as Individuals, Plaintiffs in Error, vs. Worthen Lumber Mills, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1.

Filed July 8, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, Clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full, true and correct copy of the original answers to questions propounded to jury in cause No. 1669–A, entitled Worthen Lumber Mills, a corporation, plaintiff, vs. Schenk & McDonald, a copartnership composed of Edward Schenk and Gordon D. McDonald, and Edward Schenk and Gordon D. McDonald as individuals, defendants; on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said court at Juneau, Alaska, this 31st day of August, 1918.

[Seal]

J. W. BELL,
Clerk.
By L. E. Spray,
Deputy.

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1669–A.

WORTHEN LUMBER MILLS, a Corporation,
Plaintiff,

vs.

SCHENK & McDONALD, a Copartnership Composed of EDWARD SCHENK and GORDON D. McDONALD, and EDWARD SCHENK and GORDON D. McDONALD as Individuals,
Defendants.

Answers to Questions Propounded to Jury.

SPECIAL FINDING OF FACTS.

Question No. 1.—What sum, if any, do you find should be allowed to the credit of defendants for and on account of the use of the towboat and crew mentioned in the second counterclaim set up by defendants in the answer?

Answer.—795.00 (seven hundred and ninety-five dollars).

Question No. 2.—What sum, if any, do you find should be allowed to the credit of defendants for and on account of the boom chains and piling chains mentioned in the fourth counterclaim set up by defendants in the answer?

Answer.—Two hundred and thirty-eight dollars fifty cents ($238.50).

Question No. 3.—What sum, if any, do you find should be allowed to credit of defendants for the six workmen mentioned in the fifth counterclaim set up by defendants in the answer?

Answer.—Twenty-seven dollars ($27.00).

JOHN McLOUGHLIN,
Foreman.

Entered Court Journal No. O, page 98.

Filed in the District Court, District of Alaska, First Division. Mar. 18, 1918. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: No. 3179. United States Circuit Court of Appeals for the Ninth Circuit. Certified Copy of Answers to Questions Propounded to Jury. Filed Sep. 10, 1918. F. D. Monckton, Clerk.

NO. 3179

United States
Circuit Court of Appeals
For the Ninth Circuit

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS,
a Corporation,

Defendant in Error.

Brief for Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

JOHN RUSTGARD,
Attorney for Plaintiffs in Error.

NO. 3179

United States
Circuit Court of Appeals
For the Ninth Circuit

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS,
a Corporation,

Defendant in Error.

Brief for Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Alaska, Division No. 1

JOHN RUSTGARD,
Attorney for Plaintiffs in Error.

SCHENK & McDONALD, a Co-partnership Composed of EDWARD SCHENK and GORDON D. McDONALD and EDWARD SCHENK and GORDON McDONALD, as Individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS,
a Corporation,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR

STATEMENT OF THE CASE

This cause comes up to this tribunal on a writ of error from a judgment entered in the District Court of Alaska, Division Number One, at Juneau, and in which cause these plaintiffs in error were defendants.

The action was instituted by defendant in

error to recover the sum of $1900.03 as balance upon an open account (Tr. p. 2).

Plaintiffs in error answering, first denied there was anything due on the account, and as a further defense alleged that the balance was in their favor in the amount of $1517.16 (Tr. p. 4).

In addition to these defenses, plaintiffs in error set up five separate counter-claims.

The first counter-claim is for balance in the sum of $697.20 for logs sold and delivered in 1916 (Tr. p. 5).

The second counter-claim is for the sum of $860.00 claimed to be due for use of tow boat and crew. (Tr. p. 5).

The third counter-claim is for the sum of $757.46 claimed to be due for saw logs sold in 1917 (Tr. pp. 5, 6).

The fourth counter-claim is for the sum of $238.50 claimed to be due for boom chains and piling chains loaned to defendant in error.

The fifth counter-claim is for the sum of $27.00 claimed to be due for labor furnished defendant in error.

The first and third counter-claims were taken from the jury by the Court in his instructions, upon the ground, as claimed by the Court, that there was no evidence in the case to warrant a recovery under the allegations of those counter-claims.

By special and separate verdict of the jury,

termed special findings of facts, the second, fourth and fifth counter-claims were decided in favor of plaintiffs in error, but the general verdict was in favor of defendant in error, to the extent of $838.53, the difference between the sum asked for by defendant in error in its complaint and the findings of the jury in favor of plaintiffs in error on the second, fourth and fifth counter-claims (Tr. p. 133). The special findings by the jury were not sent up with the original records, but were subsequently certified to this Court, and are attached to the transcript printed.

Costs were taxed at $1128.17 by the Clerk (Tr. p. 139).

The Court's ruling removed from the jury all questions of fact arising under the complaint and answer as well as under the first and third counter-claims.

The records before the Court deal only with those features of the pleadings and exclude all reference to second, fourth and fifth counter-claims.

At the time of the trial, defendant in error filed a bill of particular items which it claims constitutes the account sued upon. In this account plaintiffs in error are credited with four rafts of logs aggregating 1,302,360 ft. at $6.00 per thousand, or $7,814.16 for the year 1916.

The same account credits plaintiffs in error with ten rafts of logs in 1917 aggregating 2,359,005

feet at $6.50 per thousand, or a total of $15,333.55 for that year. Against these credit items are charged various items for moneys paid plaintiffs in error or paid on their behalf to the Government direct for stumpage (Tr. p. 11).

The only dispute arises over the measurement of the logs. The same questions—the measurement of the logs—arises under the issues formed by the complaint and answer as well as by the first and third counter-claims and the reply.

According to the scale of the government rangers, plaintiffs in error furnished 1,406,109 ft. in 1916, while defendant in error claims that only 1,302,360 ft. were furnished—a difference of 103,830 ft.

According to the government scale, 2,680,080 ft. were delivered in 1917, while defendant in error claims that only 2,359,005 ft. were delivered—a difference of 321,075 ft. in 1917, or a total difference of 427,905 feet.

If the government scale be declared legal by this Court, and the jury's verdict on the second, fourth and fifth counter-claims be accepted, there is a difference between the contentions of these litigants of $3,771.47, and the general verdict should have been in favor of these plaintiffs in error to the amount of $1,871.44 instead of for defendant in error to the extent of $838.53

While the complaint properly alleges but one

open account, the evidence shows that the transactions between the parties may in reality and conveniently be considered under two separate groups, viz., the transactions for 1916, and the transactions for 1917.

The records show that plaintiffs in error were loggers, operating south of Petersburg, which latter is a small town about 110 miles south of Juneau, in Alaska. The defendant in error was a corporation operating a sawmill at Juneau.

In March, 1916, the parties entered into a written contract whereby the loggers agreed to furnish to the mill company 1,000,000 feet, more or less, of saw logs from the north end of Prince of Wales Island, some 170 miles south of Juneau, at $6.00 per thousand (Ex. A. p. 124).

The defendant in error now claims that the logs furnished in 1916 were delivered under this contract, while plaintiffs in error dispute that claim. Whether the logs were delivered under that contract or not is of very little importance at this time. No logs were furnished from Prince of Wales Island, but were furnished from various other places at the same price stated in the written contract.

On January 4, 1917, the parties entered into another contract (Ex. D. p. 127), under which it is agreed all the deliveries were made in 1917. The price for that year was $6.50. Four booms were

delivered in 1916, and ten booms in 1917.

At the trial the mill company showed that it had the booms scaled at or near the mill by one John Stevenson, an employe of the company (Tr. pp. 17, 21), and that this scale was as set out in the bill of particulars (Tr. p. 17). At the trial the loggers showed they had the logs scaled by the United States forest rangers and offered to show that each raft was much larger than the Stevenson scale allowed. These offers were rejected by the Court upon the theory that by the contracts the loggers bound themselves to accept the "mill scale," and the Court held that the Stevenson scale must be considered to be the "mill scale." These rulings are all assigned as errors (Tr. Assgnmt. VI-XIII, pp. 147-149). Both contracts were typewritten upon printed forms made for and supplied by the mill company. The 1916 contract was prepared in Juneau by the manager of the company, H. S. Worthen, and mailed to the loggers at Petersburg. In the records the typewritten portions of the original are distinguished by being underscored (See bottom page 130).

The originals have been transmitted to this Court for inspection.

The printed form contains the provision that "the said first party (the loggers) agrees to accept mill scale."

There are various other parts of the contract

in conflict with the last quoted provision, but especial attention is now directed to the following clauses which are in typewriting in the 1916 contract:

"Each boom of logs shall be scaled by the party of the first part and this scale shall be sent to the party of the second part for the purpose of comparison with number of pieces in boom." (Tr. pp. 126, 127);

and

"That in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties."

The corresponding typewritten part in the contract of 1917 reads as follows:

"That in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery." (Tr. p. 130).

On the trial, plaintiffs in error offered to show that Gordon D. McDonald, who represented the loggers in all their transactions, was not sure what was meant by the term "mill scale" and that at the time the contract of 1917 was entered into Worthen explained it to him. This offer was ruled out, and is assigned as error.

Plaintiffs in error then offered to prove that in the forestry service the term "mill scale" meant

"tally behind the saw." This was rejected, and that ruling is assigned as error.

The Court ruled that plaintiffs in error might prove what the term "mill scale" meant but no evidence on this point satisfactory to the Court was offered or received. The Court, however, in absence of any evidence as to the meaning of the term in question, held that it meant the Stevenson scale.

The chief contentions of plaintiffs in error touching the question of construction of the contracts, are as follows:

1. That the typewritten clause providing for settlement of dispute over scale by a disinterested person, abrogates or annuls the printed clause purporting to obligate the logger to be bound by "mill scale."

2. That if the contract be construed to leave it with one of the parties to the contract to decide incontrovertibly what the logs scale and what is due the logger, the contract is void as unilateral and unconscionable.

3. That if the printed portion be held controlling, the contract is unilateral for the reason that only one of the parties (not both) is bound by the "mill scale." The language is "said *first* party agrees to accept the mill scale." Nothing is said about the acceptance of the "mill scale" by the second party.

4. That "mill scale" is a technical term which

requires evidence to interpret, and in absence of such evidence no meaning can be placed upon it by the Court.

5. That the Court in absence of evidence erred in interpreting "mill scale" to mean whatever scale the mill man sees fit to allow.

6. That even if the foregoing contention be not justified, the Court erred in rejecting the loggers' offer to prove the government scale, for the reason that the great discrepancy in the scale, together with various circumstantial evidence tend to show the Stevenson scale was fraudulent or the result of gross mistake.

The Court also erred in taxing as cost the sum of $1,066.17 as marshal's fees, consisting, so far as can be learned, of expenses connected with the levying of a certain attachment to secure a future judgment.

The objection to this taxation is, First, that there was no certificate of such fees filed as required by the Code; Second, the expense of executing an attachment cannot be lawfully made a part of the personal judgment, but can be collected only out of the property attached. If the property attached proves insufficient to pay the cost of the attachment, no personal liability for an officer's extravagance can be placed upon the judgment debtor.

It will be asked of this Court that the judg-

ment be reversed and that a new trial be had upon the issues formed by the complaint and answer and by the first and third counter-claims and the reply, and that the special findings of facts of the jury on the second, fourth and fifth counter-claims stand as a judgment of the Court.

ARGUMENT

—A—

THE DELIVERIES OF 1916

Attention has already been directed to the fact that the complaint sets up no contract, but simply alleges there is a balance of $1900.03 due the plaintiff below on an open and running account and for which judgment is asked.

The Bill of Particulars filed by the mill company during the trial divides the transactions between the parties into two groups: One for 1916, and one for 1917.

On the 1916 transaction the Bill of Particulars credits the loggers with four rafts, as follows:

Portage Bay raft	148,060 ft.
Port Malmsburry raft	343,480 ft.
Port Malmsburry raft	397,770 ft.
Duncan Canal raft	413,050 ft.

Total—1,302,360 ft. at $6.00—$7,814.16.

Both parties agreed that these rafts were delivered by plaintiffs in error and received by defendants in error, but the dispute arose over the contents of the "Duncan Canal raft." Plaintiffs in error offered to prove that this raft contained 516,680 feet instead of only 413,050 feet, as admitted by the defendant in error. Objection to this offer was sustained by the Court and all rulings to that offer are assigned as error. (Tr. pp. 81, 91, 93, 96, 101, 102). This evidence was material both under the general issue and the first counter-claim.

The grounds for the objection of defendant in error and the Court's ruling were, in substance, that the logs were delivered under the contract introduced in evidence by defendant in error as "Plaintiff's Exhibit A" (Tr. pp. 13, 124) which, so it is argued by the mill company, binds the loggers to accept "mill scale," whatever that means.

Plaintiffs in error insist:

First, that no logs were delivered under the terms of "Exhibit A", that this contract was abandoned, and that the logs were delivered pursuant to an oral contract entered into subsequent to the execution of "Exhibit A."

Second, that "Exhibit A" does not bind plaintiffs in error to accept "mill scale," but that the true scale must prevail.

Third, that the evidence offered and excluded,

together with other evidence in the case, tends to show the alleged "mill scale" fraudulent.

I.

WERE THE 1916 DELIVERIES MADE UNDER THE WRITTEN CONTRACT?

The evidence shows that all the timber in question is cut on the United States Forest Reserve under the rules and regulations of the Forestry Bureau. Under these rules, of which the Court takes judicial notice, the timber is purchased in small lots at an agreed price per thousand feet, board measure.

It appears that McDonald thought he knew of some valuable timber on the North end of Prince of Wales Island and in that neighborhood and informed Worthen of that fact (Tr. p. 74; Plaintiff's Exhibit "S", Tr. p. 131). The negotiations resulted in a contract to cut a clump of timber on Prince of Wales Island, about 175 miles from Juneau. The contract of March 27, 1916, was executed accordingly.

But when Mr. McDonald personally examined the timber in question, he found it undesirable for Worthen's purposes and did not buy or bid on it (Tr. p. 74). Of this fact Worthen was informed. Subsequently the mill company's captain came to McDonald at Portage Bay, close to Wrangell Narrows and more than sixty-five miles from Prince

of Wales Island, and informed McDonald that the mill company was in great need of logs and begged to let him have a small raft then in the water at Portage Bay. This was granted after permission was obtained from the party for whom the raft had been cut (Tr. p. 76). In the same manner special negotiations were had for the delivery of other rafts in 1916 (Tr. p. 76). These facts, together with the facts that the contract called for a specific tract of timber, that it limits the cut to one million feet while the deliveries here were, according to the loggers' and the Government's count, 1,406,190 feet, and the further fact that the contract is expressly "not assignable by either party," are sufficient to make it a question for the jury as to whether the contract of 1916 had been abandoned or abrogated, at least in part. If this was a question for the jury, then plaintiffs in error had the right to prove the actual amount of logs delivered, irrespective of what the written abandoned or modified contract said with reference to "mill scale."

It is now argued, however, that there is no evidence of any agreement as to price of timber delivered, except so far as shown by the written contract, and that, therefore, no evidence of quantity is material except under that contract. To this may be answered:

First. The evidence was material under the

general issue, which involves only the balance of the account. Under that issue there was nothing in dispute between the parties except the quantity of logs delivered. Worthen had testified to the items of the account on which the suit was brought (Tr. p. 15). Plaintiffs in error offered to show that the credit items were wrong—that for the "Duncan Canal Raft" they should have been credited with 516,680 feet instead of only with 413,050 feet. The price allowed by defendant in error, both in the Bill of Particulars and in the Worthen testimony, was accepted as correct and uncontroverted.

Second. The evidence was competent under the first counter-claim. There was no need for the loggers proving the price agreed on because that price had been admitted in the Bill of Particulars and was not disputed, and had been testified to by Mr. Worthen. Why prove what was conceded throughout the trial?

No doubt the jury had a right to find that the written contract had been abandoned in whole, as well as in part, and if this had been their conclusion, it is undisputed that Government scale would be competent evidence of quantity.

At no time during the trial was the loggers' evidence of the quantity of logs objected to on the ground that there was no evidence of price. That was an afterthought. The Court correctly stated

that the Bill of Particulars was a part of the pleadings (Tr. pp. 111, 112).

II.

THE CONTRACT OF 1916 *DOES NOT BIND THE LOGGERS TO ACCEPT THE "MILL SCALE".*

But even under the written contract of 1916 the Government scale was competent, both under the general issue and the first counter-claim. This raises the question of construction of the contract. It is an elementary canon of construction that a contract, if ambiguous, is construed most strongly against the party who prepared it.

> "It is a well settled rule of construction that words will be construed most strongly against the party who used them, the reason for the rule being that a man is responsible for ambiguities in his own expressions and has no right to induce another to contract with him on the presumption that his words mean one thing while he hopes the Court will adopt the construction by which they will mean another thing more to his advantage."
>
> 9 Cyc. 590.

It is also elementary that where a contract is prepared on printed blanks and there is a conflict between the written portions and the printed portions, the former must prevail.

> 9 Cyc. 584.

This contract was prepared by Worthen at

Juneau and mailed to McDonald at Petersburg (Tr. p. 18). The printed blanks were obviously prepared by or for the mill company, for this blank form recites that party of the second part is "a corporation duly organized and existing under the laws of the State of Washington," that the logs shall be ready for towing at a place "not to exceed ..... miles distant from the mill at Juneau of the said company." that the first party shall notify the second party "at its place of business in Juneau," and, finally, that the contract is signed "at Juneau, District of Alaska."

Therefore, if there are any ambiguities, they must be resolved against the mill company.

The printed part provides that "first party agrees to accept mill scale."

Considering this clause separately and as unaffected by the written portions, it is void because it is unilateral. It does not provide that the second party shall also be bound by the "mill scale." The company reserves for itself the right to accept or reject the "mill scale" and then undertakes to bind the first party, whenever it is to the company's advantage to do so; but whenever it is to the company's disadvantage to apply the "mill scale," the right to disregard it is reserved by the mill company.

This clause is so framed as to raise a suspic-

ion of intent to take unconscionable advantage of the logger.

The Court below seemed to take the position that the expression in question was intended to mean that the company reserves for itself the right to be the sole and binding arbiter of the measurement of the logs delivered. If that be the case, the contract is still void as unilateral and unconscionable.

In building contracts and kindred documents, it has become customary to appoint the architect, though employed by the owner, as arbiter of disputes over specifications and measurements, but in such cases he is not a party to the controversy and not interested in the result. But even a building contract which provides that disputes shall be determined by the owner is void.

In *Board of Commissioners v. Gibbon*, the case arose over a building contract which provided:

> "If any dispute shall arise as to the true construction of the contract or as to what is extra work, the matter shall be determined by the architect and the Board, and their decision shall be final and conclusive."

The Court said:

> "It is sufficient to say that the plain reason why such provisions will not be enforced is that the law will not permit a party making a contract to provide that he shall arbitrate

his own case and that his decision shall be final and conclusive."

Board of Commissioners v. Gibson, 63 N. E. 982 (987, 8).

The Supreme Court of the State of Washington held that where the architect had given a bond that the cost should not exceed a certain sum, he became himself so interested in the contract that he was incapacitated from acting as an arbitrator and the contract to make him sole arbiter was, to the extent of such agreement, void. In that behalf the Court said:

> "It is an ancient maxim, applicable to arbitrators as well as judges of Courts, that no man ought to be a judge in his own cause. The cause of the county became, by reason of this bond, the cause of the architects and the liability assumed by them made it to their interest to decide every question affecting the cost of this building against the claim of the contractor. Bias and prejudice would always be implied where such conditions exist and it was not necessary for the contractor to show that the architects' decisions were unjust or partial in order to relieve himself of their conclusive effect, even if it be a fact that he had no knowledge of the bond at the time he entered into the agreement making them so."

Long v. Pierce County, 61 Pac. 142 (151).

See also, *Supreme Council, etc. v. Forsinger,* 9 L. R. A. 501.

In conflict with the printed clause of the contract above quoted is the following appearing in typewriting:

> "Each boom of logs shall be scaled by the party of the first part and this scale shall be sent to the party of the second part for purpose of comparison with number of pieces in boom."

and

> "That in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties."

(Tr. pp. 126, 127).

Only a highly trained and keenly intelligent mind can discover any way of harmonizing this written clause with the printed clause above quoted. To the ordinary mind, this contract means that the true scale shall prevail and, in case of dispute about the true scale, a disinterested person shall be selected to scale the logs for both parties.

The Court and counsel argued that it was up to the loggers to start a dispute before the logs were sawed up and, inasmuch as they failed to do so, they forfeited their right to have a disinterested person scale the logs.

But plaintiffs in error had already scaled the logs. This was done by a disinterested person—the United States Forest Ranger—and, for all that appears, this scale was furnished to the mill company. At any rate, the scale by the ranger is a

matter of public record and will be furnished to anybody, on demand.

The Court will not give a statute, or a contract, or any written document, a cruel or unusual construction unless the language is so clear that no other construction can be given. Even if it were lawful to do so, the Court would not hold that authority was delegated to one of the parties to a contract to sit as judge in his own case unless the language of the document left no other alternative.

III

THE REASON FOR THE COURT'S RULING SET OUT IN THE INSTRUCTIONS TO THE JURY

An entirely new reason for excluding the Government scale of the "Duncan Canal Raft" appears in Section IV. of the Court's instructions (Tr. pp. 112-113). The Court says, in substance:

> "It is absolutely immaterial in this case about the question of how much were delivered under the contract and the amount due thereunder. I say that has nothing to do with the case now because the Bill of Particulars shows that whatever logs were delivered under that contract have been fully paid for, with the exceptionof $74.42."

Yes, that is shown by the Bill of Particulars and also by the Worthen testimony, but are these loggers bound by that testimony and that Bill of

Particulars? They offered to show that those statements were incorrect, offered to prove that the Bill of Particulars did not show all the logs delivered, offered to prove that the credit items were not as large as they ought to have been, offered to prove that the balance for 1916 was very much more in favor of the plaintiffs in error.

That was the general issue.

But the Court argues that plaintiffs in error cannot prove that there was a large credit in their favor for the 1916 transaction for the reason that the mill company had eliminated the 1916 transaction from the account by filing a Bill of Particulars during the course of the trial, to-wit, on March 16, 1918.

The logic of the Court's position is in substance and effect, that a party suing for the balance on an open account may, by dividing the account into monthly or yearly periods, eliminate all the periods in which the balances are in favor of defendant and recover on the accounts for those periods which show a balance in favor of the plaintiff, and may do so by filing an itemized Bill of Particulars during the trial.

The evidence of plaintiffs in error would show a balance in their favor for the 1916 transactions of some $1500.00, more or less. The Court argues that this makes no difference because the mill company did not sue for anything for that year.

But the company did set up a general account for both years in one. The Bill of Particulars, which was filed after the trial had commenced, as well as the tesimony of Mr. Worthen, covers both years. The loggers deny the balance against them. That is the general issue on which they were brought into Court. To come now and refuse to allow the loggers to prove the credit items because no suit is brought except upon the debit items seems rather an unfair position.

There is nothing in the record to indicate that these ideas had occurred to Court or counsel until after the evidence was all closed. Neither are these ideas given to the jury except for the purpose of explaining why they must find for the company on the general issue. Exceptions were taken to these instructions (Tr. pp. 119-121).

IV.

THE EVIDENCE ADMISSIBLE UNDER THE FIRST COUNTER-CLAIM

But even if the Court's logic be accepted as correct, it can apply only to the general issue. Independent of this issue, the evidence as to the true contents of the "Duncan Canal Raft" was certainly admissible under the first counter-claim, but this seems to have been overlooked by the Court. (Tr. pp. 96, 97, 102 Assgts. VI. VII. VIII.)

—B—

THE CONTRACT OF 1917

It is agreed that the deliveries for 1917 were made under the contract of January 4, 1917 (Plaintiff's Exhibit "D"; Tr. p. 127). There is no dispute over the number of rafts, nor over the price, nor over the payments. The only dispute arises over the number of feet in each raft. The loggers offered to prove by the Government scaler what the actual measurement of each raft was. This was ruled out by the Court on the theory that the loggers were bound by the "mill scale." (Tr. pp. 82-83, 99-100; Assignments IX, X and XI.

The correctness of the Court's ruling depends upon the construction to be given the written contract. The contract of 1917 differs from the written contract of 1916, though this seems to have been overlooked by the Court below. The last contract, like the first, is prepared on the company's blank forms, with the same printed proviso that the loggers "agree to accept mill scale," but in typewriting appears the following:

> "That in case of dispute over scale the scale of a competent, disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery." (Tr. p. 130).

Plaintiffs in error take the position that the proviso binding them to accept "mill scale" is void

for the reason already discussed in paragraph II., Ch. A., and for the further reason that even were this not so, the written provisions above quoted override the printed clause on the same subject.

9 Cyc. 584.

These features, too, have already been discussed in part.

The Court below took the position that this written proviso becomes operative only in case of dispute, and that it puts the burden on the loggers to start a dispute within thirty days after delivery of the logs. The Court's argument is as follows:

> "I cannot see how that means anything but this: The logs shall be scaled at the mill and the result shall be accepted, and payment shall be made inside of 30 days unless within that time there is a dispute. Put the shoe on the other foot. Suppose a lot of logs were delivered at a mill and the mill scaler scales them and they amount to 500,000 feet more than are really in the boom. Suppose the Government scaler had scaled those logs before they had got to the mill and he found that there were 500,000 feet less than the mill scale shows it, but the mill man pays for those logs according to his scale—does not discover that there is anything wrong at all—does not dispute his own scale, and pays for them. The 30 days elapse and there is no dispute of any kind. Do you think the millman could go back to the logger and make him rebate the difference? The logger would say, 'you paid me ac-

cording to your scale?' 'Yes,' 'What right have you to come back on me? That was my contract.'"

(Tr. pp. 82, 83.)

This is, at best, a most strained and technical, as well as an unusual, construction which would never occur to laymen, who alone in this case were concerned, and will be discussed more at length later in this brief.

At the time this document (Plaintiff's Exhibit "D") was signed, Mr. McDonald was in Juneau trying to get a settlement for the 1916 deliveries. For the purpose of determining what was in the minds of the parties at the time the 1917 contract was signed, it should be remembered that the mill company admits it was behind $74.42, while plaintiffs in error claim the company was in arrears more than $600.00 on logs alone, and a still larger sum for towing and labor. It was evidently for the purpose of fixing a time limit within which payments would have to be made that the clause requiring payment in full within thirty days was inserted, and not for the purpose of fixing a time limit within which to start trouble.

But other clauses of this contract, as well as the practical construction given it by both parties, render the position of the lower Court untenable.

It is provided in the contract:

"Said logs shall be considered delivered

> when, and in such amounts as, taken in tow by the tug-boat of said second party."

and that this was to be done at Portage Bay, "110 miles distant from the mill at Juneau of the said company."

After the logs were delivered at that place, they were the absolute property of the mill company. The latter might then sell the logs and it might lose them on the way. The danger connected with the towing of logs through the waters of Alaska is notorious. If the loggers were bound by "mill scale" they were obviously bound to depend upon the safe and certain conveyance of the logs to Juneau. Worthen himself testified that loss of logs and even of whole rafts were nothing uncommon. (Tr. p. 71).

THE PRACTICAL CONSTRUCTION OF THE PARTIES.

In the case at bar, it never occurred to either of the parties to give to the document in question the construction which has been placed upon it by the learned Court below. But this practical construction is of the greatest aid to the Court in determining the intent of the parties on the subject and their view of their own contract.

"Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the Court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the Court, and in some cases may be controlling."

9 Cyc. 588.

"A so-called written contract between parties is, in a sense, not their contract. It is rather the evidence of their agreement that is back of the contract. For that reason it must be an exceptional case where the practical construction that the parties have given to a contract of doubtful import will not control the Courts in interpreting it."

Board of Commissioners v. Gibson, 63 N. E. 982 (987).

If the Court's construction of the contract were correct, it would obviously be the duty of Worthen to take the logs to the mill and hold them thirty days after "mill scale," so as to give the loggers a chance to disagree and call for a disinterested scaler. But this was never thought of by Worthen nor by McDonald. Here is the statement of Worthen:

"Mr. Rustgard (to Mr. Worthen).—I was going to inquire from you in regard to your testimony. I think it was to the effect that in 1917 you were short of logs, and you sawed

them up just as fast as you got them. That was your testimony, wasn't it?

Mr. Worthen.—I don't recall being asked that, but that was pretty nearly the fact.

(Questions by the Court).

Q. Where are all these logs now?

A. Cut up and distributed.

Q. When were they cut up?

A. Last summer.

Q. The last boom under the 1917 contract was scaled July 15th, was it not?

A. I think something like that.

Q. Now, when was the timber sawed into lumber—when did it go through the mill?

A. You mean the exact date?

Q. No, approximately. What was the custom when the logs would come in?

A. It depends on how many we have on hand. If we have a lot of logs we take them up into the upper bay—

Q. What is the average?

A. The average—sometimes it is a week; sometimes it is six months.

Q. Have you no recollection about these logs?

A. I think these logs were finally all sawed up before the first of September.

Q. Have you no recollection as to when you received the last raft on July 15th what had become of the logs before that?

A. With the exception of that one boom they had been sawed up during the summer; we had one boom up on the tide flats at Price's Point."

(Tr. pp. 106 107).

And before that, in regard to scaling Worthen testified:

"The rafts are usually scaled as soon as they come in here to the mill. Sometimes they lay for a month or six weeks and sometimes they are put in the upper bay and lay there *three months* before they are scaled by my men. I have the record of only one of the rafts scaled in 1916; of the records of the last boom. I did not have the time when the first booms were scaled. There is nothing on the records to show by whom they were scaled—only that I remember it. * * * We did not always enter the scale in the books as soon as he gave us the scale. I usually kept it in my desk. They were not always entered in the books. The last boom in 1916 was entered at the time it was scaled, September 22nd, I think it was. That is the boom from Duncan Canal."

(Tr. p. 19).

It is obvious that the thirty day limitation for starting a dispute and calling in another scaler had never been in Worthen's mind. It was too abstruse to filter into him, even during counsel's clever argument. The point is too refined to be laid hold of by the rough hand of a layman.

What was the practical view taken of this proviso by McDonald?

"Q. Mr. McDonald, after the logs or rafts were delivered to the towboat 'Carrita', of the plaintiff company, you don't know whether they reached the mill or not?

A. I do not.

Q. Under the contract they were his when he hooked on to them?

A. That was the agreement.

Q. Now, then, did you ever ask him for a statement of an accounting before this suit was brought?

A. We asked him for a statement at the time we came up here to settle for the year's business of 1916.

Q. And after that time did you ask him for any statement of the account for 1917?

A. Yes, we asked him at that time for a statement covering also 1917.

The Court: What time was that, Mr. McDonald?

A. That was at the time the dispute arose, and we had not received any scale at that time or any other time.

The Court: What time was it that you asked him for a statement on the 1917 contract?

A. It was in the latter part of August, along about the 20th or 25th, somewhere along the last part—couldn't say the exact date.

The Court: That was the first dispute you had?

A. That was the first—the first time we ever received a statement or a scale from the Worthen mills. He had never issued any statement of his scale or anything about it."

(Tr. pp. 87, 88).

"Q. You don't know anything about whether that is the raft that Stevenson scaled?

A. I know nothing about it after it leaves my presence. They were to be delivered under the agreement when he hooked on to them.

The Court: Where were they to be delivered under your agreement?

A. They were to be accepted at the camp and they are no more our logs when he hooks

on to them. That is the rule everywhere in regard to any timber—or at least it is the customary rule.

The Court: That being the case, the logs are delivered when the tug boat takes them—the logs are delivered down there?

Mr. Rustgard: They become Worthern's property that moment.

The Court: Very, well, proceed.

Q. You didn't come to Juneau at all and you don't know what happened here?

A. I don't know anything about it.

Q. You paid no more attention to any of these rafts after they hooked on to them?

A. Nothing."

(Tr. p. 95.)

Worthen knew that this was the construction placed upon the agreement by McDonald, for the latter never asked for a scale from Worthen, but Worthen did ask for the scale of the foresters. (Tr. p. 80).

Again, behold the absurdity resulting from the Court's construction: If the logger had thirty days in which to start trouble, and the mill company had thirty days, and no more, in which to pay, the latter would be forced to wait to the last minute of the thirty days before paying or a dispute might start after payment. The thirty day clause, under that construction, would operate to prevent payment within the thirty days.

In this connection, it may be stated that the

contract provides that the logs shall be cut "under the terms and conditions required by the Forest Service regulations," which means, *inter alias*, that they must be scaled by the Government before they leave the camp.

With this rule Worthen was conversant, for all timber in Southeastern Alaska is within the Forest Reserve. He knew, too, that the stumpage was paid for according to this scale. He himself paid that stumpage and charged it to the loggers (Tr. p. 16; Bill of Particulars, p. 10), and he knew that McDonald never inquired about the "mill scale'" He knew McDonald paid no attention to the logs after they were delivered. Worthen himself, and not McDonald, had a chance to know what the difference was between the "mill scale" and the Government scale which McDonald had to follow. If the mill company was dissatisfied with the Government scale, it was Worthen's duty, if anybody's, to call McDonald's attention to the fact and call in a third scaler to settle the dispute.

This seems the natural construction for a layman to adopt and the contract in question was designed by and for laymen, not for hairsplitting lawyers.

Worthen admitted, as has been shown, that most of the logs were cut as soon as they came to the mill, and that others were not scaled by him for three months after their arrival. He admits

that if he needed the logs when they arrived at the mill he would have cut them up immediately. That the thirty day period was fixed as the limit within which the logger could accept or reject the "mill scale" never occurred to him.

THE COURT'S ARGUMENT.

The Court's argument in support of its ruling on the contract for 1917 has already been quoted. This argument is plausible and, unless it is examined in detail, may be misleading.

In the first place, it overlooks vital facts and, in the second place, overlooks vital principles of law.

It ignores the practical construction placed upon the contract by both parties prior to the trial, as heretofore pointed out. It ignores the fact that the thirty day clause was inserted, not as a limitation for starting disputes, but as a time limitation for payment. It ignores the fact that the mill company paid no heed to the thirty day limitation, but sometimes sawed the logs as soon as they came to the mill, and sometimes did not scale them for months after they were received. It ignores many of the other provisions of the contract which are in conflict with the Court's interpretation.

Moreover, the Court erroneously and without evidence assumes that "mill scale" means any scale made by the mill man or under his direction and,

in addition, assumes there is no difference in legal status between an executed and an executory contract.

The Court's own illustration led the learned Court into error. The Court said, in substance:

> "Suppose the mill man made an error of 500,000 feet in the scale of a raft, and suppose, before discovery of the error, he paid according to that scale, could he recover?"

The learned Court's answer is "No." From this he draws the conclusion that the contract, after its execution, being binding upon the mill man, it must, before execution, be binding upon the logger. The learned Court's logic carries him into the error of holding that it is perfectly lawful for a party to act as judge in his own case because, if perchance he should erroneously decide against himself, he would not be in position to complain after entry of judgment.

Let the logic of the learned Court be analyzed a little further. Suppose the mill scaler made an error in his scale and it was discovered before payment. What would happen? The mill owner would simply reduce the scale to what he was willing to allow. If the Court's view of the contract is correct, that would be the mill man's privilege. He is the sole arbiter of what to pay. The burden of starting the dispute is not on him. Would the logger have to stand for this kind of a deal?

But suppose that the contract had been fully executed and the money paid, can the mill man come into court and complain that he overpaid the logger under a mistake of facts and seek to recover what was erroneously paid? In answer, the following principles of law are submitted:

First. A party who insisted on sitting in judgment on his own case is not in position to complain that he rendered a decree too favorable to his antagonist.

Second. A party who has fully executed a contract will not be heard to complain that the contract was void.

Third. A party who has fully executed a contract will not be heard to complain that the contract was so much too favorable to himself as to be unilateral.

Fourth. A party who, due to mistake of facts, has paid money under a legal contract may recover, as fraud or mistake vitiates any transaction.

The propositions referred to in this chapter have been discussed in detail in the other parts of this brief. They are repeated at this time for the sole purpose of applying them to the learned Court's argument submitted at the time of the trial.

—C—

MEANING OF "MILL SCALE"

The term "mill scale" is a technical term and

it is therefore proper to show its meaning by oral evidence.

16 Cyc. 875.

The Court ruled that plaintiffs in error were entitled to show by oral evidence the meaning of the term in question. (Tr. pp. 84, 85.)

This is tantamount to holding that the term is a technical phrase of the meaning of which the Court does not take judicial notice.

No evidence was adduced showing the meaning. Under the circumstances, the Court had no right to impute to the term any meaning whatever. Nevertheless, the Court evidently accepted counsel's statement or contention as to the meaning of the term "mill scale" as true and correct, for the Court's ruling is based on the assumption that counsel's contention as to its meaning is correct.

McDonald testified that he did not know what the term "mill scale" meant (Tr. p. 84) and had never seen it used until he saw it in these contracts. For this reason he discussed the meaning of this phrase with Worthen at the time the 1917 contract was signed and offered to testify to what Worthen then explained that the term meant, but this testimony was excluded by the Court, which ruling is assigned as error (Tr. p. 85; Assignments II. III, IV, and V., Tr. p. 147). It may well be conceded that if it had been shown that the term

has a well defined meaning, oral evidence of any agreement as to its meaning is in the nature of varying the terms of a written instrument. But where, as in this case, it is not shown that the term has any definite meaning, and especially where, as here, it is proven affirmatively that the meaning is uncertain, oral evidence as to the meaning agreed upon by the parties at the time of signing the contract is only for the purpose of explaining the patent ambiguity by extrinsic evidence and cannot be said to be an attempt to vary the terms of a written instrument.

17 Cyc. 682, 685.

> "Parole or extrinsic evidence of the understanding of the parties in respect to the construction of a written instrument may be given to explain that which would otherwise be ambiguious, and for this purpose evidence of declarations of a party made to or at the time of signing the contract is admissible."

17 Cyc. 675.

Mr. McDonald having testified that he could not state that the term in question had any definite, well understood meaning and having been refused the right to testify what Worthen at the time of signing the contract explained the term to mean, Supervising United States Forester, Mr. G. W. Weigle, testified that the term "mill scale" was

frequently used in the Forestry Service where it had a well defined meaning, but the Court ruled that the meaning of the term in that field was incompetent as evidence (Tr. pp. 103, 104; Assignments XIII, XIV, and XV, pp. 149, 150). Plaintiffs in error then offered to prove that in the Forestry Service the term "mill scale" means the tally of the lumber after the logs are run through the mill,—"the tally behind the saw" (Tr. p. 145). This was also objected to and the objection sustained, which ruling is also assigned as error (Assignment XV, Tr. pp. 149, 150).

There can be no doubt that the Bureau of Forestry aims to employ words and phrases in the sense they are usually employed throughout the country. No one will doubt that if the phrase in question was used in a contract between the logger and the Bureau of Forestry, or between the mill company and the Bureau of Forestry, Mr. Weigle's testimony would have been competent. Now, when that same logger and that same mill company use the same term in a contract between themselves concerning the same logs, would it be presumed that this term then has a different meaning?

Until the contrary be shown, it should be permissible to presume that the meaning of the term "mill scale" in the Forestry Service is the universal or accepted meaning in the trades dealing with saw logs, because that is the special field of the Bureau.

And if it was incumbent upon the Court, in absence of evidence, to decide what was the meaning of the term "mill scale," it should have been ruled that the term meant "tally behind the saw," for that is the holding of the higher tribunals.

Rowe v. Chicago Lumber & Coal Co., 24 So. 235.

It must not be overlooked that if this be the meaning of the term in the printed blank, it is clearly abrogated by the typewritten clauses which call for a scale by a disinterested party—obviously before sawing.

There is, then, absolutely no chance for harmonizing the printed clauses with the typewritten clauses and the former must be held to have been abrogated by the latter.

—D—

EVIDENCE ON GOVERNMENT SCALE WOULD SHOW GROSS ERROR OR FRAUD IN THE STEVENSON SCALE

The evidence shows that the mill company had the logs scaled by one of its employees, John Stevenson (Tr. p. 15). This man did not know who had cut the logs or where the rafts came from (Tr. p. 41).

"Q. How do you know it came from Schenk and McDonald?

A. I don't know.

Q. You don't know?

A. I don't know.

Q. Where was the second boom you scaled in 1917 when you scaled it?

A. It was laying in the same place.

Q. How do you know that came from Schenk and McDonald?

A. I don't know it.

Q. Do you remember where the third boom was when you scaled it in 1917?

A. Yes.

Q. Where was it?

A. It was up the bay here tied to some pilings up in the log pond here.

Q. How do you know that came from Schenk and McDonald?

A. I couldn't swear that it did."

(Tr. pp. 41, 42).

Mr. Worthen made an effort to prove that the rafts scaled by Stevenson came from Schenk and McDonald, but evidently he knew no more about it than Stevenson.

Q. You were not on the boat when the tug hooked on to the rafts to tow them up here?

A. No. I was not.

Q. Were you here always when your tug came in with a raft?

A. They might have come in with one or two rafts when I was not here; I was out to the Westward about a week; the rest of the

season I was except about a week, from Monday to Friday, I was out."

(Tr. p. 69).

"Q. Didn't your men lose some logs out of a boom they got from McDonald?

A. Not that I know of. Of course I don't know what transpires on the water any further than what they report when they get here.

Q. Didn't you testify in this Court on the injunction proceeding that you knew of one raft where your men lost half a dozen sticks?

A. I don't recall it now.

Q. Did I ask you this question on that examination: "And that is all that has been delivered under this contract? A. Yes, sir. I would like to add by way of explanation that in one of those booms there were five logs lost out of the peak coming up, for which, in looking over the books, I discovered there had been no allowance made to Mr. McDonald'—did you so testify?

A. I might have—I don't recall it at this moment.

Q. For all you know there might have been several logs lost?

A. They might have lost them all for all I know, but they got here with some—I wasn't out on the boat on a single trip.

Q. Under the contract the logs were yours when you hooked on to them at Portage Bay?

A. That is what the contract says."

(Tr. pp. 71-72).

Whether the scales which Stevenson turned in were of Schenk & McDonald's rafts or not is

not shown by any competent evidence. Much less does it appear that the rafts when scaled by Stevenson contained all the logs delivered by plaintiffs in error. Moreover, all the testimony of Stevenson is set out in the Bill of Exceptions and shows for itself that this man is shifty and unreliable and not very intelligent. His testimony is such that, standing alone, it throws doubt upon his fairness and intelligence as a scaler.

But the trial court stood this proposition on its head. While it seemed to plaintiffs in error that it was up to the Mill company to prove that the logs which Stevenson scaled were the logs and all the logs which the plaintiffs in error delivered, the Court put the burden upon the loggers to prove that some of the logs had been lost or that Stevenson scaled the wrong raft. Said the Court:

> "I permit the defendants to show that the logs delivered to Worthen under this contract were not the logs that Worthen had scaled at the mill." (Tr. p. 93).

Even if all that counsel claim for the contracts be conceded the burden is still on defendant in error to prove that its scale was of the logs delivered and of all of them; and this proof may be controverted by such evidence as the case is susceptible of.

If it were conceded that the contracts call for the acceptance of the Stevenson scale and that that

feature of the contract is valid, and it be also conceded his scale was of all the logs delivered, it must also be conceded that his scale cannot be attacked except for fraud, for gross error or mathematical error. But the discrepancy between the Government and the Stevenson scale is such as to prove *ipso facto* either fraud or gross mistake in calculation or that the wrong rafts were scaled.

The counting of the logs and their measurements are mathematical problems which involve no appreciable exercise of judgment. Only the estimate of defects and their deduction from the gross involves skill. Stevenson's evidence shows what he found to be the gross scale, i. e., the exact measurement of each raft, and also shows the amount of his deductions for defects, but these same records also show that the Government scale, after deducting defects, exceeds the gross scale or measurements by Stevenson.

Referring to the "Duncan Canal Raft," as an example, Stevenson testified it measured 451,520 feet in gross, 38,470 feet in deductions, leaving a net scale of 413,050 feet (Tr. pp. 26, 27). The Government found that this raft, even after deductions for defects, contained 516,680 feet (Tr. p. 97; Assignment VIII, Tr. p. 148) or 65,160 feet more than the gross total found by Stevenson. What the Government's gross scale and deductions amounted to does not appear, but that is immaterial for the purpose of this inquiry.

This marked difference in the mere matter of measurement is not due to a difference in judgment.

These facts go to show that Stevenson either scaled the wrong rafts or some logs had been lost from it before it reached the mill, or he had made some radical errors in his measurements or in his calculations.

It is interesting to note that the original notes of the scale had been lost (Tr. pp. 25, 26). At this time the offer to prove the Government scale was made, counsel for plaintiffs in error stated:

> "I submit to the Court, and I want it in the record, that at the present time there is nothing tangible to show that the raft which was surveyed or scaled by Mr. Stevenson is the raft which Mr. McDonald delivered to Worthen. I will state to the Court that I shall prove that the difference between the true scaled contents of the raft and the scale testified to by Mr. Stevenson is so great that either it proves that it was not the same raft or else there was a fraudulent scaling. That the difference in the gross scale as well as in the lineal feet is so great as to prove fraud."
>
> (Tr. p. 92).

In view of all the circumstances above recited, it was a question for the jury to decide whether the Stevenson scale was fraudulent or the result of gross error. The jury might well find that Stevenson scaled the wrong raft or that he missed some of the logs or that there was fraud.

The situation with reference to the 1917 rafts —ten in number—is exactly the same as the "Duncan Canal Raft." In each case we have both the gross and the net scale of Stevenson, as well as the gross and net scale of the Government, and in each case the net scale of the Government very much exceeds the gross scale of Stevenson, except in two rafts (Tr. pp. 28-37, 100; Assignments IX and X., Tr. p. 148).

Now, in conclusion, it is obvious that had the jury found that the Government scale was correct, it would have found that there was no balance due the mill company, but that on the account of logs alone, there was a balance due the loggers in the sum of $1517.16, as alleged. Moreover, the jury would have found in favor of plaintiffs in error, both on the first and the third counter-claims, the first being for logs delivered in 1916, and the third for logs delivered in 1917. Under the rulings of the Court both of these counter-claims were taken away from the jury for want of evidence to support them. (Tr. p. 121).

—E—

THE COSTS

The costs, as taxed by the Clerk of the Court against plaintiffs in error, amount to $1128.17.

Of this amount, the sum of $1066.17 is the Marshal's fees.

Plaintiffs in error object that this amount of Marshal's fees is illegally taxed as part of the judgment, except to the amount of $99.16.

The grounds for the objection are as follows:

1. At the time the Bill of Costs was filed, there was no certificate by the Marshal on record showing what his fees were over and above $99.16.

2. After objection was filed, such certificate was filed, but the time for so doing had expired, and the certificate showed the fees objected to consisted of expenses of the Marshal in taking care of property attached by defendant in error, and are therefore not taxable against plaintiffs in error personally, but can be paid only out of the property levied upon.

Section 1348, Compiled Laws of Alaska, provides:

> "Sec. 1348. Costs and disbursements shall be taxed and allowed by the Clerk. No disbursments shall be allowed any party unless he shall file with the Clerk within five days from the entry of judgment a statement of the same, which statement must be verified except as to fees of officers. A statement of disbursments may be filed with the Clerk at any time after five days, but in such case a copy thereof must be served upon the adverse party. A disbursement which a party is entitled to recover must be taxed, whether the

same has been paid or not by such party. The statement of disbursements thus filed, and costs, shall be allowed of course unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars of such objections."

Section 1349, Compiled Laws of Alaska, provides:

"Sec. 1349. When objections are made to the claim for costs and disbursements, the Clerk shall forthwith pass upon the same, and indorse upon the verified statement, or append thereto, the charges allowed or disallowed. Any person aggrieved by the decision of the Clerk in the allowance of costs or disbursements may appeal from such decision to the Court within five days from the date of such decision, by serving a notice of such appeal, and in what particulars, upon the adverse party or his attorney, which appeal shall be heard and determined by such Court, or judge thereof, as soon thereafter as convenient."

The verdict was returned March 18, 1918 (Tr. p. 133). The judgment was entered March 25, 1918 (Tr. p. 136). The cost bill was filed March 25, 1918 (Tr. p. 139). The objection to the cost bill was filed April 1, 1918 (Tr. p. 137), within two days after the five days allowed for filing the cost bill by Section 1348. On the next day, April 2, 1918, the Clerk taxed the costs as asked by the judgment creditor (Tr. p. 139). On the 2nd of April, 1918, after the time for filing objections had

expired, and unbeknown to judgment debtors, so far as the records show, the Marshal filed a certificate stating that the Marshal's fee for serving attachment was $96.17, keeper's fee, $970.00; total $1066.17.

This is an amendment of the original cost bill after the time for filing the cost bill had expired, and even after the time for filing objection to the cost bill had expired.

Moreover, this certificate shows that none of the Marshal's fees were legally taxable as part of the personal judgment, but could be deducted only from the proceeds of the property attached. If these proceeds were not enough to pay the expenses of the attachment, those expenses should not be made a part of the personal judgment.

If the original bill of costs was defective, the judgment creditor had the right to move for an order allowing him to amend.

Willis v. Lance, 43 Pac. 384.

But this was not done. These amendments should, therefore, have been disregarded by the Clerk.

The judgment debtors in due time appeal to the Court (Tr. pp. 124 and 140).

Thereafter, and on the 3rd day of April, 1918, the appeal was submitted to the Court (Tr. p. 124). The next day the Court directed the plaintiff (de-

fendant in error) to file a certified statement of the Marshal's fees taxed by the Clerk (Tr. p. 124). This was done the same day and the taxation by the Clerk was affirmed (Tr. pp. 124, 141).

The itemized statement by the Marshal called for by the Court showed each item of expense (Tr. p. 143). This shows that the Marshal's fees objected to are not properly taxable as part of the personal judgment but are expenses connected with the keeping of the attached property and can be charged only against the proceeds of the property attached.

Moreover, it was too late for defendant in error to amend the cost bill after an appeal had been taken.

It would seem reasonable that if the Marshal spends, at the instance of plaintiff in action, more money in keeping the property than the property is worth, the judgment debtor should not be held personally for this expenditure. Yet, if the property attached had brought nothing at the sale, or had been lost, the defendants below under the rule applied in this case would nevertheless suffer a personal judgment against them for this expense.

The better rule would seem to be that the Marshal's expense be paid out of the proceeds of the property, the same as is the case in execution.

—F—

CONCLUSION

If the Government scale had been admitted, there would have been evidence that there was no balance in favor of defendant in error. The same evidence which thus would have defeated recovery under the allegations in the complaint would also have sustained the allegations in the first and third counter-claims.

Inasmuch as no controversy has arisen over the special verdict under the second, fourth and fifth counter-claims, that verdict should be allowed to stand and new trial should be ordered of the issues formed by the complaint and answer and by the first and third counter-claims and the reply. All of which is respectfully submitted,

JOHN RUSTGARD,

Attorney for Plaintiffs in Error.

No. 3179

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SCHENK & MCDONALD, a copartnership composed of Edward Schenk and Gordon D. McDonald, and EDWARD SCHENK and GORDON MCDONALD, as individuals,

Plaintiffs in Error,

vs.

WORTHEN LUMBER MILLS (a corporation),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

J. A. HELLENTHAL,
SIMON HELLENTHAL,
Attorneys for Defendant in Error.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

This is an action originally brought by the defendant in error as plaintiff against the plaintiffs in error as the defendant on an open account extending from October, 1916, to September, 1917, the date on which the action was commenced.

A bill of particulars was filed, showing that the parties had dealt with one another prior to October, 1916, but the complaint did not demand anything from the plaintiff in error because of such dealings.

It is claimed in the complaint that the defendant in error had advanced money and merchandise to the plaintiffs in error in the sum of $17,308.00, and that the plaintiffs in error had agreed to furnish logs to the defendant in error or repay said amount in cash. That $15,407.97 had been paid, which amount included $74.42 due the plaintiffs in error in the Fall of 1916, the balance of the amount paid having been paid during the year 1917, leaving the amount due at the time of commencing suit $1,900.03.

A bill of particulars was filed, showing the various items sued for as well as the credits and also showing the items of account existing between the parties prior to October, 1916.

The defendants answered, and denied the indebtedness and filed five counter-claims. In the first counter-claim it was alleged that between the 1st of May, 1915, and September, 1916, the defendants sold and delivered a quantity of logs to the plaintiff (defendant in error) on which there was still due the sum of $697.20.

A second counter-claim set up the fact that in the Summer of 1916 the defendants furnished the plaintiff with a tow-boat, and that there was due them the sum of $860.00 on that account.

The third counter-claim set up the fact that between March, 1917 and August, 1917, the defendants sold and delivered to the plaintiff a certain quantity of logs on account of which there was still due the defendants the sum of $757.46.

The fourth counter-claim was based upon allegations to the effect that the defendants had furnished the plaintiff with certain boom chains of the value of $238.50. And a fifth counter-claim was based on the alleged fact that the defendants had furnished the plaintiff with a number of workmen, on account of which there was still due them the sum of $27.00.

The new matter in the answer as well as the matters and things set up in the counter-claims were denied. Upon the trial, and upon this appeal, there was, and is, no dispute with reference to the items charged by the defendant in error to the plaintiffs in error. The real dispute between the parties related to the credits given the plaintiffs in error by the defendant in error for logs delivered to it. Two written contracts were offered and received in evidence, one made in the Spring of 1916, and the other in the Spring of 1917.

Both of these contracts relate to the delivery of logs by the plaintiffs in error to the defendant in error. The defendant in error did not upon the trial claim anything under the first of these contracts, all the moneys advanced thereunder having been repaid by the delivery of logs prior to October 1916, there being then a balance due the plaintiffs in error of $74.42, so that the entire demand of the defendant in error is based upon the transactions had under the contract made in the Spring of 1917. It might here be added that one of the items of account sued upon was an item of $1050.00 advanced

in cash on October 12, 1916, and which was advanced to pay stumpage on logs to be cut in 1917. At that time, as stated, there was due the plaintiffs in error from the defendant in error the sum of $74.42, which indebtedness was of course paid up when the thousand and fifty dollars were paid.

In order to avoid repetition, the various contentions made by counsel for plaintiffs in error will be taken up and discussed here in the order in which they appear in his brief.

Argument.

A.

THE DELIVERIES OF 1916.

Under this heading counsel discusses the dealings had between the parties during the Summer of 1916. As has already been pointed out, it is entirely immaterial so far as the defendant in error's case was concerned, what these dealings were, because the complaint did not claim anything because of them. These dealings were had before October, 1916, and the account sued upon commences in October, 1916. The only way that the transactions had in 1916 could become material would be by proper allegations in a counter-claim. Now the first counter-claim set up by plaintiffs in error contains allegations to the effect that a sum therein named is due because of logs sold and delivered in 1916, but the claim made was based upon an alleged

agreement concerning which no evidence was introduced. There was a contract received in evidence as Exhibit A between the parties with reference to the sale and delivery of logs during the Summer of 1916, but it is not the contract upon which the first counter-claim of the plaintiffs in error is based, the claim of the plaintiffs in error being that this contract was abandoned and that the logs to be delivered under it were delivered under a subsequent oral contract.

I. *Were the 1916 deliveries made under the written contract?*

Under this head, counsel for plaintiffs in error argues that the logs delivered in the Summer of 1916 were in fact not delivered under the written contract made by the parties in the Spring of that year, but that this contract was abandoned and another and different oral contract substituted in the place thereof. The contract, Exhibit A, provides that the logs to be delivered as specified shall consist of one million feet more or less,—not of an exact one million feet, as counsel seems to indicate, are to be cut on the north end of Prince of Wales Island and placed in the waters of the sea, and that the place where they are boomed up for the tug boat to get them shall not exceed 170 miles distant from the mill at Juneau by the ordinary route of water travel.

Now the logs that were actually delivered in 1916 did not come from the north end of Prince of Wales

Island, but from other places a short distance from there, and it is argued by counsel for plaintiffs in error that this fact results in an abandonment of the contract. It must be borne in mind in this connection that the thing dealt with was saw-logs, not saw-logs that grew in this or that particular spot. The only importance that the place where the logs should be cut could have was to locate that place not too far distant from the sawmill, because the mill company was obliged to tow the logs; hence the stipulation in the contract that the place where the logs were to be delivered was not to exceed 175 miles from the mill. If logs cut at some place other than the place designated in the contract were delivered and accepted by the mill company there would surely be no abrogation of the contract. To illustrate, suppose the price of logs had gone down and logs were delivered and received by the mill company. Under those circumstances, the court would not permit the mill company in an action brought for the price to show that those logs were not delivered under the contract and should be paid for only at their reasonable worth.

On the other hand, suppose logs had gone up, the court would not permit the party delivering the logs to come in and say that those logs were not delivered under the contract and should be paid for at a higher price. The subject-matter dealt with was the saw-logs. One of the parties sold these logs and the other bought them, and so

long as the logs were delivered and accepted without a specific agreement to the contrary, the court would hold the deliveries made under the contract and the fact that the logs were not cut at the identical place referred to in the contract is an immaterial matter.

Of course the parties could, by agreement, abrogate the contract and make a new one, but courts do not presume that that sort of action was taken. The substitution of one contract for another should be by the execution of another agreement of equal dignity with the contract abrogated. In this case the original contract was in writing so that the contract substituted should also have been in writing. In any event, even if a written contract were not required for that purpose, there should be at least clear and explicit oral testimony upon the subject. In this case there was none. True, counsel for plaintiffs in error says that Mr. McDonald investigated the timber and found that the timber on Prince of Wales Island was not suitable and did not for that reason make a bid on it with the Forestry people and so advised Mr. Worthen. But surely this was not an abrogation of the contract; there was no agreement here; the plaintiffs in error simply told the defendant in error that they were not going to bid on this particular timber because it was not suitable, but no one said anything about the abrogation of the contract.

Later on, according to the brief of plaintiffs in error, the mill company's steamboat captain came

to McDonald at Portage Bay and told him that the mill was in great need of logs and begged to let him have a raft then in the water at Portage Bay.

It can be readily understood why the mill company was in great need of logs. If plaintiffs in error's theory is the correct one, the plaintiffs in error had a perfect right to make a solemn contract to furnish these logs and then by simply notifying the defendant in error that they were not going to cut them, absolve themselves from all obligation and leave the defendant in error with a sawmill without logs, and then when defendant in error begged for logs the plaintiffs in error should, according to counsel's theory, be permitted to say that those logs were not furnished under the contract, and should be permitted to take advantage of their own wrong with a view of avoiding the obligations stipulated in the contract.

There is nothing here to indicate that the captain of the steamer, or any one else, absolved the plaintiffs in error of obligation under the contract or agreed to take these logs under any other or separate agreement. The only testimony upon the subject outside of that of Mr. Worthen is that of Mr. McDonald, and after giving it a most favorable construction, it does not tend to prove a novation, the abrogation of the original contract or the substitution of a new one.

At page 74 of the record Mr. McDonald says that at the time of the execution of the contract he told Worthen that he thought the timber on the

north end of Prince of Wales Island was good. He thought he told him that he would look it over again and that after he had looked it over he told him he did not think the timber was really good and that he did not apply for a sale of it to the Forestry Department. He said he thought this talk with Worthen was sometime in April, a short time after the signing of the contract and that after that he delivered logs to Worthen. That the captain of the "Caritta", the tow-boat of the Worthen Lumber Company came to him and told him that the mill was short of logs and asked him for logs and that he furnished him a boom then at Portage Bay. The conversation narrated was the only conversation had by him at that time and that other logs were delivered on similar occasions.

Previous to this time it will be remembered, Mr. McDonald had had no conversation with Mr. Worthen, the conversation was with the captain of the steamboat, but after the delivery of the Portage Bay raft, and prior to the delivery of the other rafts made in the Summer of 1916, he had a conversation with Worthen himself, and that conversation, according to the testimony on page 76 of the record, was as follows:

> "As far as my mind goes on that, I think I had a talk with Mr. Worthen in January here, after I was here in the spring, and he asked if he could get those logs, and he also took it up with the George E. James Company who had the logs or who the logs were put in for in the first place, and they refused to let him have them, as far as I understand from

the conversation I had. The James Company afterwards told me I could dispose of them if I wanted to—that is, if I saw fit they wouldn't hold them any further—they were not able to take them at that time.

"Q. They were logs that were cut for the James Company? A. Yes.
"Q. And subsequently at the request of Mr. Worthen they released you? A. Yes.
"Q. And you turned them over to Worthen?
"A. Yes.
"Q. And what time was that?
"A. It was in June.
"Q. June, 1916?
"A. Yes, about the 24th of June when their tug-boat came into camp."

Testifying to a later conversation, the witness testified:

"Q. Did you have any further conversation with Worthen in regard to that?
"A. Well, we had a conversation here at the time, here in Juneau, that season, along about the middle of the season, in regard to logs in Duncan Canal, and he asked if he could get some logs from Duncan Canal, as near as I remember, and I told him I would give him a boom from Duncan Canal, and he got the boom in September."

Now, that is all the testimony on the subject of a new and second contract. Nowhere does any witness testify that the parties agreed to do away with the first contract, nor does any witness testify to the execution of a new one. True, the plaintiffs in error did not cut the logs they agreed to cut on Prince of Wales Island and the manager of the Worthen Mills implored them to deliver logs cut

elsewhere, but at no time was there any conversation between the parties to the effect that those logs were either to be under the contract or not to be under the contract. There was no discussion about the price of the logs; nothing was said about the manner of delivery for the obvious reason that both parties understood the logs to be delivered under the contract then existing between them.

If Mr. McDonald or any witness had testified clearly and explicitly to a subsequent agreement, there might be something to discuss, but since there is no evidence from any witness that there was such a thing as a subsequent agreement, it is idle to discuss the existence or non-existence of such an agreement. In order to prove a novation or a subsequent agreement there must be clear proof first that it was agreed that the original agreement should be abandoned; and second, that a new agreement should be substituted in the place thereof, and for this there must be a consideration. See

29 Cyc., 1130;
In re Hansford, 194 Fed. 658.

Whenever parties deal with reference to the subject-matter of a written contract existing between them, there is only one presumption that can be indulged in and that is that they deal under the contract. Here the subject-matter of the contract was saw-logs, not saw-logs cut on Prince of Wales Island, or at any other particular place, but saw-logs, and the question of where they were to be cut was important only in determining the distance

the logs were to be towed. The towing was to be done by the mill company, and if the mill company took logs from a point other than that designated in the contract without complaint, the company simply waived that provision in the contract.

Since therefore there was no novation and no new and subsequent contract, but the dealings had between the parties in the year 1916 were under the written contract, "Exhibit A", plaintiffs in error could not recover on their first counter-claim because that counter-claim was based not on a balance due under that contract, but on a balance due under another and different contract concerning which there was no evidence.

It may here be added that even if there had been no contract between the parties at all, either written or oral, there could not be a recovery on this counter-claim under the evidence for the evidence only goes to the effect that certain logs were delivered. There is no agreement as to what was to be paid for them; that is to say, outside of the original written contract, nor is there any evidence as to what these logs are reasonably worth. There could be no recovery on express contract at so much per thousand, because under the evidence the parties never referred to price; nor could there be a recovery on a *quantum meruit,* because there is no evidence as to what the logs were reasonably worth.

The court therefore was clearly correct in holding that there could be no recovery under the first counter-claim. As shall be indicated hereafter,

the court's ruling would have been nevertheless correct even had the written contract been set up in the counter-claim, but as the counter-claim was not based upon this written contract that question becomes largely academic.

The logs delivered were scaled at the mill by one Stevenson, employed by the mill company for that purpose. Mr. Stevenson, the record shows, was a professional log-scaler, of wide experience, who was employed from time to time by the mill company to do its scaling and had otherwise also been employed for short periods in connection with special work, but was not a regular employee.

At the trial the plaintiffs in error tried to introduce evidence with a view of proving that the scaling done by Stevenson was not correct; that is to say, they offered proof to the effect that the forest rangers, who had also scaled the logs, had scaled them somewhat higher than Stevenson. The court excluded this evidence with reference to logs delivered under either contract. The evidence that was offered with reference to the 1916 contract was excluded on the ground, first, that the contract itself was immaterial and that all evidence relating to the quantity of logs delivered in 1916 prior to October was immaterial; and second, on the further ground that in any event the testimony was immaterial under the provisions of the contract.

As has already been pointed out, the plaintiff did not sue to recover anything due because of dealings had prior to October, 1916, so that ne-

gotiations had between the parties prior to that date became immaterial unless made material by proper allegations in a proper counter-claim.

It has also been pointed out that the contract relied upon for a recovery in plaintiffs in error's first counter-claim for the dealings had in 1916 was not the written contract then in existence between the parties, but an alleged verbal agreement concerning which no evidence was offered. Hence testimony relating to the quantity of logs delivered during 1916 under the agreement set up in the counter-claim was immaterial, there being no evidence that there was any agreement.

Turning now to a discussion of the contract itself, we find that the ruling of the court was equally correct even though a contract had been properly before the court; that is to say, even though the plaintiff had made a demand for something due prior to October, 1916, or the defendant had set up this written contract by proper allegations in a counter-claim. It may here be added that the allegations of the counter-claim being somewhat uncertain upon the subject, their construction was made clear by the evidence offered in the case and the statements of counsel both upon the trial and before this court.

The statement of counsel as it occurs in his brief, for instance, is as follows:

> "Plaintiffs in error insist first, that no logs were delivered under the terms of Exhibit A; that this contract was abandoned and that the

logs were delivered pursuant to an oral contract entered into subsequent to the execution of Exhibit A."

Then we come to the head "second": "the contract of 1916 does not bind the loggers to accept the mill scale".

This is the proposition as stated by counsel for plaintiffs in error under subdivision 2, the contention of defendant in error being that the contract of 1916 is such under the circumstances of the case that the plaintiffs in error were bound by the mill scale.

When the contract of 1916 is considered as a whole, it will not only be seen that the contract is entirely reasonable, but that all the various provisions can be readily harmonized so that effect can be given to each and all of them.

With reference to this matter of scaling, the contract provides as follows:

> "The said logs shall be scaled by the Scribner log rule and the said first party agrees to accept the mill scale."
>
> "Each boom of logs shall be scaled by the party of the first part, and this scale shall be sent to party of the second part for the purpose of comparison with number of pieces in boom."
>
> "And it is further agreed that in case of dispute over scale, the scale of a competent disinterested person shall be accepted as final by both parties."

In the construction of this contract, it must be borne in mind that these logs were to be cut within the Forest Reserve where they would be scaled

by forest rangers. It could, of course have been provided that the scale of the forest rangers should have been accepted by the parties, but while it is necessary for persons taking timber from the public domain to pay stumpage in accordance with this scale, few practical mill men would wish to pay for logs upon a basis of the scale made by these young men. They may be fair enough and do the best they can, but the fact remains that they are scaling the logs with a view to collecting stumpage for their principal. In the purchase of logs from the Government Forestry Department, the purchaser cannot dispute the scale of the forest rangers; he must accept that scale and pay stumpage accordingly, or leave the logs, and if he has once invested his time and labor in cutting the logs, he is of course in no position to leave them. But while that is true as far as the payment of stumpage is concerned, a sawmill operator purchasing the logs has a right to exercise the option of scaling them himself before he purchases the logs from the party who has purchased them from the government. When the logs are so scaled by the mill operator, that of course is the mill scale as distinguished from the forest rangers' scale. When logs are purchased at the mill scale, the mill operator can fix a price accordingly. In this case, the price fixed was $6.00 per thousand mill scale. Had the logs been purchased at the forest rangers' scale, a different price would undoubtedly have been agreed upon.

Now the contract provides that the loggers shall accept the mill scale. There is nothing unreasonable about this, nor is there anything unusual about it. It simply binds them to the mill scale as distinguished from the forest rangers' scale. And this contract provides that the Scribner rule shall govern in scaling the logs, so that it provides just what the mill scale consists of, the idea being to so scale the logs that the loggers would be paid $6.00 per thousand for the lumber actually contained in the logs, regardless of what stumpage was paid.

It is next provided that the loggers, the parties of the first part, should scale the logs themselves and supply the mill with a copy of their scale showing the number of pieces for the purpose of comparison.

The loggers in this case have not shown that this provision of the contract was complied with by them.

The next provision is that in case of dispute, a disinterested third party should be called in to scale the logs and his decision shall be final.

Clearly it was the intention of the parties that the parties of the first part, that is to say the loggers, should send in their scale with the logs in order that it might be compared with the scale made at the mill, and if there was any dispute between these two scales a third party was to be called in to settle the controversy.

But, as has already been stated, there is no evidence that the loggers ever scaled the logs or sent in a scale in order that their scale might be compared with the mill scale. And in any event, there is no evidence that there was any dispute about this scale until the time of the trial.

Now, if the loggers were not satisfied with the scale made by the mill company, certainly they should have disputed the correctness of that scale within a reasonable time, disputed it before the logs were sawn up in order that the third party might re-scale the logs. To say that they can wait for nearly two years, as counsel contends for, after the logs have been sawed into lumber and the lumber sold, and then dispute the correctness of the mill scale by saying that the scale of the forest rangers was something different, results not only in doing away with the provisions of the written contract, but in bringing about the very conditions that those provisions were evidently designed to guard against; that is to say, the adoption of the forest rangers' scale, for the logs having been sawed into lumber, neither party is in any position to prove the correctness of this or that scale, or to offer any evidence touching the question of how many feet were contained in the logs except the evidence on one side of the mill scale and the evidence on the other side of the forest rangers.

Clearly the contract itself does not contemplate any such state of affairs, because it provides that in case of dispute the logs shall be re-scaled by a

third party; hence, under the terms of the contract the parties intended to provide that the dispute must arise while the logs were still in existence so that they could be re-scaled.

Counsel for plaintiffs in error contends that evidence of what the forest rangers' scale consisted of was admissible in the first place to prove that the credit allowed by the Worthen Company for logs delivered in 1916 was not correctly allowed. But counsel forgets in the first place that this is an action on an open account only for items occurring since October, 1916. All these logs were delivered before that time so that if the credits prior to that time were not correctly allowed, they could be brought to the attention of the court only by a counter-claim, and counsel, as we have shown, has placed upon the contract itself a construction entirely erroneous because the scale by which the logs were to be measured is the mill scale and not the forest rangers' scale under the express provisions of the contract and, since the correctness of the scale made by the mill was not disputed until two years after the logs were sawn into lumber (whereas the contract provides that the dispute shall be settled by a re-scaling of the logs by a disinterested party, evidencing the intention of the parties that a dispute to be entertained must be made while the logs are still in existence, which is not only in accord with the express language of the contract, but in accord with reason and common sense), the court very properly refused to permit the witnesses to

testify at this time as to what the scale of the forest rangers was.

Counsel, however, contends that this evidence was competent under the first counter-claim. He says:

> "There was no need for the loggers proving the price agreed on because that price had been adopted in the bill of particulars and was not disputed and had been testified to by Mr. Worthen. Why prove what was conceded throughout the trial."

Counsel seems to forget that the point with reference to his first counter-claim is that he must first prove a contract between the parties such as he alleges in the counter-claim. Mr. Worthen admits that the price to be paid for the logs was $6.00, but his conception of the transaction was that the logs were delivered under the written contract which provided for the payment of $6.00. Throughout the trial it was agreed that $6.00 was the price under the written contract, but neither Mr. Worthen nor any one else agreed that $6.00, or any other sum, was to be paid under a subsequent oral contract. Mr. McDonald did not so testify, nor did any one else at the trial testify that the price was to be $6.00, or any other sum, nor did any one testify to any agreement at all for the sale of logs at $6.00 or any other price except the agreement that was in writing. There is the difficulty with counsel's position. He set up a verbal contract in his counter-claim and then failed to prove it, or to offer any evidence of such contract and, as before stated, had there been no written contract at all, the proof

would not have been sufficient even to permit counsel to recover on a *quantum meruit,* because in that case he would have been compelled to prove the reasonable value of the logs. Even this was not done.

In view of what has been said, it is not necessary to follow counsel in the discussion of propositions relating to the construction of contracts for it is not a question of whether the printed or typewritten portions of the contract shall prevail, because they are in perfect harmony, so there is no occasion to hold that either one or the other shall prevail over the other, nor is there any question as to how this or that ambiguity shall be considered, for we have shown that there are in this contract no ambiguities.

The parties simply provided that the mill scale should prevail, a provision that was evidently inserted with the view of giving the mill a chance to scale the logs so that it would pay only for the lumber contained therein regardless of what the logs were scaled at by the forest rangers who were interested in collecting as much stumpage as possible.

The contract further provided that the loggers should scale the logs themselves and send the result of this scale together with the number of pieces to the mill for purpose of comparison.

Now, it must be borne in mind that this provision does not provide that the loggers shall cause the logs to be scaled by the forest rangers. No

provision in the contract was necessary to bring that about for the forest rangers would scale the logs in any event. But it was provided that they must scale the logs themselves and send the scale indicating the number of pieces to the mill for purpose of comparison.

Then it is provided later in the contract that in case of dispute over the scale the logs should be re-scaled by a disinterested third person and that his decision should be accepted as final by both parties.

The reason for this provision is also obvious. Both parties were interested in having disputes with reference to scale settled as early as possible, so that the logs might be sawed up with safety, and one party get his money for the logs and the other his money for the lumber. There having been no dispute with reference to the scale and two years having elapsed since the logs were cut into lumber so that no one can either prove or disprove the correctness of this or that scale, the court very properly held that the mill scale prevailed independent of any of the other propositions heretofore alluded to. Viewed, therefore, from any point, the ruling of the court was correct.

B.

THE CONTRACT OF 1917.

As stated by counsel in his brief, it is conceded that all the logs delivered in 1917 were delivered

under the contract Exhibit D, and the only question in dispute with reference to this whole matter is whether the parties furnishing the logs are bound by the mill scale or had a right to call witnesses to show what the logs scaled according to the scale made by the forest rangers.

Like the contract of the previous year, this contract expressly provided that the parties furnishing the logs were to accept the mill scale. The provisions with reference to the scale in this contract are as follows:

> 1st. "The said logs shall be scaled by the Scribner log rule, and the said first party agrees to accept the mill scale.
>
> "And it is further agreed that in case of dispute over scale the scale of a competent disinterested person shall be accepted as final by both parties. All logs shall be paid for in full within thirty days from date of delivery. 34 ft. logs shall be scaled as 32 ft. long."

The price of the logs was fixed at $6.50 per thousand. Clearly in fixing the price of the logs in this case as in the case of the preceding year, the price was based upon the mill scale and not upon the forest rangers' scale, for the contract provides that the parties furnishing the logs shall accept the mill scale and that the scale when made at the mill shall be made by the Scribner log rule.

If, for any reason, the parties furnishing the logs are not satisfied with the scale made at the mill, the contract provides that they shall have the right to have the logs re-scaled by a third party who

shall be disinterested and competent and whose scale shall be final and accepted as such by both parties.

Clearly the parties intended that if a dispute with reference to the correctness of the mill scale should arise it should be before the logs were cut into lumber, for the dispute under the contract was to be settled by a re-scale of the logs by a disinterested third party whose decision was to be accepted by both parties as final, for the obvious reason that it was desired by both parties that matters should be left in such shape that the mill could proceed to cut the logs into lumber and, as pointed out by the trial court, it is expressly provided that the logs should be paid for within thirty days, and clearly it was not the intention of the parties that the logs should be paid for and a dispute settled afterwards.

In this case the logs were paid for long before the thirty days; in fact, they were paid for in advance, not only paid for but over-paid for, and that is what gave rise to this controversy, but the intention of the parties themselves is clearly manifest by the provisions of the contract.

The contract not only fixes, as has been pointed out, the time of payment, which could not very well be made until all disputes with reference to the quantity of logs delivered had been settled, but also provides that disputes shall be settled by a re-scaling of the logs which cannot be done after the logs have been sawed into lumber and ceased to exist.

Under this state of facts the court held that the parties furnishing the logs are bound by the mill scale and could not now dispute it by an attempt to prove what the forest rangers scaled the logs at. How the court could have held anything else is difficult to conceive. If parties furnishing logs could make this kind of a contract and then come in when they were sued to recover for provisions furnished them for which they had not delivered logs, and dispute the correctness of the mill scale after the logs had been sawed into lumber, they could not only lay back with the forest rangers' scale, but could bring in any number of witnesses who might testify they had scaled the logs and found them to contain thus and so many feet, and none of this evidence could be rebutted by the sawmill company, for it had only scaled the logs once and the logs were no more because they had been cut into lumber. Any such ruling would do away with the safety provided by written contracts and open the door for fraud and chicanery.

That the ruling of the court resulted in doing substantial justice is evidenced from the fact that these logs when sawed into lumber did not make as much lumber as the loggers were paid for by the mill company; that is to say, the mill scale was somewhat higher than the actual lumber contents of the logs. (See evidence Worthen, record, page 64.) This being the case, the mill company at least did not get any the better of it. But even if it did, the contract is explicit in its terms so that the

parties would be bound by the mill scale unless the correctness of that scale were disputed in the manner indicated in the contract itself.

Counsel, in discussing the court's decision, treats it as though the court held that the parties were given under the contract just thirty days within which to start a dispute on the scale. The court did not hold this. What the court did hold was that in view of the fact that payment was required in thirty days it was reasonable to presume that the parties did not expect that a dispute should be started after payment was made; so that thirty days was at least a reasonable time to allow the parties to dispute the scale. It occurs to us that the court placed a construction on that portion of the contract most liberal to the loggers, for the contract also provides that in case of dispute over the scale a disinterested third party shall re-scale the logs and both parties shall accept the result of such scale as correct.

This part of the contract clearly provides for the manner in which disputes about the scale shall be settled, and also clearly indicates the time during which such disputes shall arise and that time is limited to the time when the logs at least in the ordinary course of business would still be in existence.

No mill owners buy logs and keep them in the boom for a great length of time, for two reasons: in the first place, it would mean an unnecessary investment of capital, and in the second place logs

deteriorate very rapidly if kept in the water for a long period of time without cutting them into lumber.

All these facts were known to the parties when the contract was made, and knowing these facts they provided for a scale of the logs themselves in case of dispute.

Under the contract therefore, it is incumbent upon the party questioning the mill scale to dispute its correctness while the logs were still in exsitence so that a re-scale could be made and, as was well stated by the court, it surely cannot be presumed that it was the intention that the logs should be paid for and that thereafter the disputes concerning the scale should be settled between the parties. There is nothing inconsistent in the provisions of the contract. It is provided that the mill scale shall govern and where disputes arise a disinterested party re-scales the logs, but when the logs are so re-scaled, the scale is nevertheless the mill scale as distinguished from the scale by the forest rangers and it is this scale at the mill, whether made by the party employed by the mill or by a third party in the case of dispute, that governs. Since there was no dispute in this case, the court correctly held that the scale by the party employed by the mill for that purpose must be accepted by the parties under the contract. And this is in entire harmony with the construction placed upon the contract by the parties themselves.

The mill company scaled the logs upon arrival and credited the logging concerns with the logs supplied. It did not fortify itself with a great deal of evidence touching the contents of each boom, as it would have done had it had in view coming lawsuits or coming disputes concerning the contents of the book. The logs were simply scaled and when needed they were cut up, and that they were fairly scaled is evidenced from the fact that when cut up they did not produce as much lumber as the loggers were given credit for.

Worthen agreed to pay the stumpage charges; that is to say, to advance the money to the loggers to pay the stumpage charges, and of course in order to make such payments was obliged to get the forest rangers' scale to determine the number of feet charged. But knowing that this was supposed to be in excess of the actual number of feet in the log according to mill scale, that is to say, the scale designed to determine not how much stumpage is to be charged but how much lumber the logs would produce, paid no further attention to the matter but cut up the logs, and McDonald never said a word about any dispute until this litigation arose months after the logs had been cut into lumber.

Nor is there anything unreasonable or harsh in enforcing the contract that provides the parties shall accept the scale at the mill, for clearly when the parties made the contract they had in their mind the distinction between the scale of the forest service and the scale at the mill in determining

and fixing prices, and it would not only be harsh but unreasonable to compel the mill company to pay the price based upon the mill scale and accept the scale of the forest rangers in determining the number of feet.

Under this contract the mill company was not to be the judge of its own case; it was simply provided that it should scale the logs and if the other parties were not satisfied with this scale they could call in a disinterested third party to make a new scale, and both parties agreed to accept the scale made by the disinterested third party. Nothing could be fairer, and nothing could be more practical.

Counsel devotes a great deal of space in his brief to the meaning of the term "mill scale". What that term means is very obvious from this contract. It was a scale made at the mill in accordance with the Scribner log rule as distinguished from a scale made by the forest rangers. This is perfectly clear, but counsel was given every opportunity by the court to prove what the term meant when employed in contracts such as this, and if it had any other meaning favorable to counsel's position, he was certainly given every opportunity to show this.

The statement of counsel in his brief that the court ruled that plaintiffs in error were not entitled to show by oral evidence the meaning of the term "mill scale" is erroneous. Counsel called a witness to prove what the term means when used in the literature of the Forest Department. The court held that this was immaterial, but at the same time

told counsel that he might call witnesses to show what the meaning of the term was when employed in contracts between loggers and mill men or when used by parties engaged in the business that these parties were engaged in.

Counsel first called as a witness Mr. McDonald, and asked him what the conversation was between him and Mr. Worthen as to the interpretation to be placed on the term "mill scale". The court sustained an objection to that question on the ground that it was not a question of what was said by the parties but the meaning of the term when employed in contracts such as the one before the court. The language of the court, which occurs on page 85, is as follows:

> "The COURT. Objection sustained. That is not the question. The question is what is a mill scale. He uses the terms of an industry that has its own phraseology, supposed to be known to the persons that are using it, but perhaps unknown to the jury. Now, he may be asked what is meant when the term 'mill scale' is used between loggers and mill men, because the jury do not necessarily know what that means, but I think any representations made by Worthen to him as to what he understands by it, or by him to Worthen as to what he understands by it are all merged in the contract. Otherwise there would be no safety in making a contract."

Later on, the witness Weigle was asked to give a definition of the term "mill scale" as accepted by the Forestry Department. The court sustained an

objection to this question, employing the following language, as it occurs on page 104 of the record:

> "The COURT. The objection is sustained, unless this witness knows what it means in the usual acceptation of the term between millmen and loggers. Within those limits I will allow testimony, but I cannot allow testimony as to what it means in relation to a matter that is not before the court."

Counsel further contends that the evidence of what the forestry scale was should have been admitted since it would show gross errors or fraud in the Stevenson or mill scale.

The difficulty with this whole contention is that even if all that counsel claimed were true, the scale by the government forest rangers would not show anything of the kind. Everyone would expect the forest rangers' scale to be higher than the mill scale. The former is made with the view of how much stumpage the Forestry Department shall get and is made by the parties collecting the stumpage. The second is made with a view of determining how much lumber can be actually cut from the logs. But laying all this aside, if there is a difference between the two scales, the fact that such a difference exists might with equal propriety prove gross error on the part of the forest rangers, and if it was the purpose of counsel to prove either error or fraud in the mill scale made by Stevenson, he should have set up these facts in his pleadings. These are matters that must first be plead before they can admit of proof. He did not even ask to amend his plead-

ings so as to admit proof of fraud or mistake. But the whole difficulty with the situation is that the contract clearly did not contemplate the acceptance of the scale by the forest agents, but the scale at the mill. And further, that under the terms of the contract it was clearly not the intention of the parties that this mill scale should be disputed months after the logs were cut into lumber so that no proof touching the correctness of the mill scale could be offered by the mill company. And, with this in view, the court sustained the objection.

The statement of counsel that his proof might be altered to show that the rafts scaled by Stevenson were not the rafts delivered at all is not borne out by the record. There is no dispute between the parties as to the identity of these rafts. Worthen testifies that the rafts delivered by Schenk and McDonald were the rafts scaled by Stevenson. McDonald testifies to the delivery of these rafts. Stevenson testifies that these rafts came from McDonald and Schenk, and referred to them as rafts coming from this or that particular point. Of course these witnesses were not on the tow-boat to observe every movement touching these logs from the time the tow-boat hooked on to them until they were scaled, but they had all the knowledge concerning that subject that any one connected with a business of that character could have.

The court told counsel upon the trial that if he could in any manner prove that the rafts scaled were not the rafts delivered, he might do so, but

refused to admit proof of what the forest rangers' scale was when offered simply to show that there was a discrepancy between the scale of the forest rangers and the mill scale, there being no dispute between the parties as to the identity of the rafts.

The mere fact that one party scaled the raft and found it contained more lumber than the other would not prove that the rafts scaled were not the same rafts. It would simply prove there was a difference between the result of the work of scaling as conducted by the two men.

Clearly the case was fairly tried and the contract fairly considered and substantial justice was done between the parties. The court under the contract held the loggers to the mill scale, but the evidence shows that when the logs were actually cut into lumber they did not produce as much lumber as the mill scale called for. So that the loggers were paid more money than they would have been entitled to had they been paid for the actual lumber in the logs. This being true, the result of the case is eminently fair as far as all parties are concerned.

Plaintiffs in error complain of the assessment of costs, not because this or that item of the costs were not actually incurred or were not a proper subject of taxation, but because in the judgment of counsel the procedure had was not the correct one. An examination of the record will disclose the fact that counsel has merely taken an erroneous view of the procedure required by the statute.

Section 1348 of the Compiled Laws of Alaska, provided as follows:

> "Sec. 1348. Costs and disbursements shall be taxed and allowed by the clerk. No disbursements shall be allowed any party unless he shall file with the clerk within five days from the entry of judgment a statement of the same, which statement must be verified except as to fees of officers. A statement of disbursements may be filed with the clerk at any time after five days, but in such case a copy thereof must be served upon the adverse party. A disbursement which a party is entitled to recover must be taxed, whether the same has been paid or not by such party. The statement of disbursements thus filed, and costs, shall be allowed of course unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars of such objections."

Now what transpired in this case was this: on the same day that the judgment was entered a cost bill was filed. This cost bill contained the item of $1066.17 as marshal's fees and this cost bill was duly sworn to. That is to say, all the items, including this item, were sworn to as being correct, and as having been necessarily incurred in the prosecution of the case. (See record, pages 138, 139.)

Under the section of the statute quoted it was not necessary that this item of marshal's fees should have been sworn to. The proof of its correctness would be presumed from the records, but there is nothing in this section which precludes the making of the proof of correctness of marshal's

fees or any other officer's fees by the ordinary oath, and oath of the correctness of this item along with all the others, was duly made.

Thereafter counsel for the plaintiffs in error filed an objection with the clerk against the allowance of this item and on the 2nd day of April, the marshal filed a certificate in the clerk's office certifying that these costs had been actually and necessarily incurred, and thereupon the clerk allowed the cost bill. This certificate so filed by the marshal was no part of the cost bill and its filing was not an amendment to the cost bill, as counsel suggests. In filing the certificate, the marshal's office merely lodged with the clerk additional evidence of the amount of its expenditures and the clerk having allowed the cost bill as filed, the matter came up before the judge on appeal. The judge thereupon directed the marshal to file an itemized statement. This itemized statement of the costs was served on counsel for plaintiffs in error before the matter came up for hearing before the court; and when the matter came up before the court counsel on both sides were present and no objection was made to a single item contained in the cost bill or in the itemized statement of the marshal. This being true, the court allowed the cost bill as filed and made the following order, which shows the proceedings had, and which appears on page 141 of the record:

"Order Affirming Taxation of Costs by Clerk.

"This matter coming on to be heard upon an appeal on the part of the defendants from an order of the clerk taxing the costs that had accrued up to the date of the judgment at $1,066.17, and the plaintiff having filed and presented to the court an itemized statement, duly certified to by the United States Marshal, of the amount of all the costs of the U. S. Marshal so taxed, which said statement had been previously served on counsel for the defendant, and both parties being present by counsel and no objection being made to any of the items contained in said itemized statement, the court finds that said costs were properly taxed and affirms the order of the clerk, and orders that the costs herein up to the date of the judgment be and the same are taxed in the manner previously taxed by the clerk, that is to say, in the amount of $1,128.17.

"Done in open court this 3rd day of April, 1918.

"Robert W. Jennings,
Judge."

There was no reason why the court could not affirm the clerk's order without asking the marshal to produce this itemized statement; the cost bill had been sworn to and there had been no affidavit or other evidence presented tending to show that the sworn statement of the cost bill that this amount had been disbursed and that its disbursement was necessary in connection with the prosecution of the suit, was not correct. The order of the court to produce this itemized statement was evidently made out of an abundance of precaution on the part of the court to avoid mistakes and to be

fair to the parties, and when this statement was presented and no objection was made to a single item in it, the court could follow but one course and this was to tax the costs as stated in the cost bill; as already stated, the court did not order an amendment of the cost bill, but merely ordered the production of further evidence touching the correctness of the cost bill when the marshal's certificate in itemized form was required.

The costs in this case were exceptionally high, but there was no way to avoid them, since the Alaska statute requires the marshal in attaching personal property to take it into his possession, and this makes it necessary to place a keeper in charge of property of the character here involved.

The plaintiffs in error might have given a bond or taken some such step as that to have the attachment released, and in that manner might have avoided these costs, but no such step was taken by them, so that it became necessary to attach and hold the logs with the result that the costs as taxed by the court were actually and necessarily incurred.

In taxing the costs, the court not only acted justly, but took every possible precaution, as we have already shown, to deal fairly with all the parties concerned.

It may be said that throughout the entire trial, the court acted with the same degree of fairness, and that his rulings, as we have indicated, were not only in accord with sound reason, but also in

strict accord with the law as applied to the facts before the court, so that the judgment should be affirmed.

Respectfully submitted,

J. A. HELLENTHAL,
SIMON HELLENTHAL,
Attorneys for Defendant in Error.

No. 3180

United States Circuit Court of Appeals

For the Ninth Circuit.

CHIN FONG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

FILED
MAR 6 - 1913
F. D. MONCKTON,
CLERK.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names of Attorneys.

For Petitioner and Appellant:

GEO. A. McGOWAN, Esq., San Francisco, California.

For Respondent and Appellee:

JOHN W. PRESTON, Esq., U. S. Attorney, and CASPAR A. ORNBAUN, Esq., Asst. U. S. Attorney.

In the District Court of the United States, in and for Northern District of California, Southern Division.

16,205.

In the Matter of the Application of CHIN FONG, on Habeas Corpus.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus (excluding exhibit) and amendment thereto.
2. Order to Show Cause.
3. Return of Respondent.
4. Judgment and Order Dismissing and Denying Petition for Writ.
5. Exceptions reserved.
6. Stipulation and Order Approving Statement of the Case and Agreed Statement of facts with respect thereto.

7. Notice of Appeal.
8. Petition for Appeal.
9. Order Allowing Appeal and Releasing on Bond.
10. Citation, original and copy.
11. Orders Extending Time to Docket Case.
12. Stipulation and Order regarding Immigration Record.
13. Appearance Bond.
14. Clerk's Certificate.
15. Assignment of Errors.

GEO. A. McGOWAN,
Attorney for Petitioner. [1*]

[Endorsed]: Due service and receipt of a copy of the within Praecipe is hereby admitted this 29th day of August, 1917.

JOHN W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

Filed May 20, 1918. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

(No. 16,205.)

In the Matter of CHIN FONG (13,137/½ Ex S. S. "PERSIA," Dec. 23, 1913), on Habeas Corpus.

*Page-number appearing at foot of page of original certified Transcript of Record.

Petition for Writ of Habeas Corpus.

To Honorable Judge now Presiding in the Above-entitled Court:

Comes now Chin Guy Get, and files this, his petition for a writ of habeas corpus herein, upon behalf of Chin Fong, hereinafter referred to as the detained:

That the said detained is unlawfully imprisoned, detained, confined and restrained of his liberty, by Edward White, Commissioner of Immigration for the port of San Francisco, at the United States Immigration Station on Angel Island, in the county of Marin, State and Northern District of California, and within the Southern Division thereof;

That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien, and not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and the Act of April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of [3] April 7th, 1914, which said acts are commonly known and referred to as the Chinese Exclusion and Restriction Acts, and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China;

That the said Commissioner claims that the said

detained arrived at the port of San Francisco on or about the 23d day of December, 1913, on the S. S. "Persia," and thereupon made application to reenter the United States as a resident Chinese merchant lawfully domiciled therein, and that the application of the said detained to enter the United States as such merchant was denied by the said Commissioner of Immigration, and that an appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the Secretary of the Department of Labor, and that the said Secretary thereafter dismissed the said appeal; that it is admitted by the said Commissioner of Immigration and the said Secretary that the said detained was admissible into the United States under the Act of Congress approved February 20th, 1907, as amended by Act of March 6th, 1910, commonly known as the General Immigration Laws thereof; that it is claimed by the said Commissioner that in all of the proceedings had herein the said detained was accorded a full and fair hearing, and that the action of the said Commissioner and the said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided, and in accordance with the regulations promulgated under the authority contained in said statutes.

But on the contrary your petitioner alleges upon his information and belief that the hearing and proceedings had herein, and the action of the said Commissioner, and the action of the said [4] Secretary, was and is in excess of the authority committed

to them by the said statutes and the said rules and regulations, and that the denial of the application of the said detained to re-enter the United States as a resident Chinese merchant and lawfully domiciled therein was and is an abuse of the authority committed to them by the said statutes in each of the particulars hereinafter set forth:

That the said detained was for more than a year prior to his departure from the United States a merchant and a member of the firm of Kwong Mow Lan & Company, which is and was a firm engaged in buying, selling and dealing in merchandise, at a fixed place of business at No. 8 Pell Street, in the Borough of Manhattan, city of New York, State of New York, and that he had been so engaged for more than one year prior to his departure from the United States for China upon said temporary visit; and that the said detained prior to his departure gave the names of two credible witnesses other than Chinese, to wit: Israel P. Brand, of No. 207 Center Street, and John Delmonte, of No. 7 Burling Slip, both of the City of New York; and that in the furtherance of his intention to so depart from the United States the said detained departed through the port of San Francisco on the steamer "Nile" on or about the 23d day of November, 1912, and at the conclusion of said temporary visit to China the said detained returned to the United States through the said port of San Francisco, and thereupon presented and made application to the said Commissioner to re-enter the United States as such returning Chinese merchant, and the said Commissioner received said

application and examined the same, causing the said store of Kwong Mow Lan & Co. to be examined, and found that the same was a genuine mercantile establishment, and such as is contemplated by the Chinese Exclusion and Restriction Acts, and the two said credible witnesses other than Chinese, [5] Israel P. Brand and John Delmonte, were examined under oath and testified in substance and effect that the said detained had been such a Chinese merchant for more than one year prior to the date of his said departure for China, and that the examining Immigration Inspector reported that the said two white witnesses were credible witnesses, and further reported that the said detained had been such a merchant for more than one year prior to the date of his departure for China, and that during said time he had engaged in the performance of no manual labor of any kind or description whatsoever, save and excepting only such duties as were incumbent upon him in the conduct of his business as such merchant, and the report of the Immigration Inspector in charge of the Chinese Division of the Immigration Service in the city of New York was in substance and effect that the mercantile status of the said detained for the year prior to his departure aforesaid for China had been established in full and complete compliance with the provisions of Section 2 of the Act of Congress of November 3d, 1893, entitled, "An Act to amend an Act entitled 'An Act to provide for the coming of Chinese persons into the United States,' approved May 5th, 1892," which said section prescribes the evidence necessary to be pre-

sented by a Chinese person applying to re-enter the United States after a temporary absence therefrom as a Chinese merchant claiming a commercial domicile therein.

Your petitioner further alleges that notwithstanding the presentation of said evidence showing the mercantile standing of the said detained as hereinbefore set forth, the said Commissioner of Immigration denied the application of the said detained to re-enter the United States, the said denial not being based upon any deficiency in the evidence presented to establish the mercantile [6] status of the said detained for a year prior to his departure from this country for China, but on the contrary the denial of the said Commissioner was based upon the conclusion and opinion of the said Commissioner of Immigration that the said detained had not established to the satisfaction of the said Commissioner of Immigration that his original entry into the United States had been accomplished in a lawful manner, and that the said detained was therefore illegally within the United States under and by virtue of the provisions of Section 12 of the Act of Congress of May 6th, 1882, as amended and added to by the Act of Congress of July 5th, 1884, which said last mentioned act was entitled, "An Act to amend an Act entitled 'An Act to execute certain treaty stipulations relating to Chinese,' approved May 6th, 1882," and under and by virtue of the provisions of Section 13 of the Act of Congress of September 13th, 1888, entitled, "An Act to Prohibit the Coming of Chinese Laborers to the United States." And it is further

claimed by the said Commissioner of Immigration that the legality of the residence of the said detained in the United States prior to his said departure upon said temporary visit to China had not been determined by any Justice, Judge, or Commissioner of a Court of the United States; and the said Commissioner therefore held and contended that upon the application of the said detained to re-enter the United States he, the said Commissioner of Immigration had the right to determine the question of the mercantile status of the said detained for the year prior to his departure for China as in said section 2 provided, and in addition thereto had the right to determine the legality of the original entry of the said detained into the United States and also to determine the legality of the residence of the said detained in the United States prior to the said period of one year mentioned in said [7] Section 2 of said Act of November 3d, 1893, and that notwithstanding the compliance with the provisions of said Section 2 by the said detained, the said Commissioner of Immigration denied the application of the said detained to re-enter the United States as a returning merchant having a commercial domicile therein, basing his said denial, however, upon the conclusion of the said Commissioner that the original entry of the said detained into the United States in 1897 was illegal, for the reason that the said detained did not satisfactorily account to the said Commissioner of Immigration for the present whereabouts of the papers upon which the detained claimed to have been originally admitted into the

United States. That from the excluding decision of the said Commissioner of Immigration an appeal was taken to the Secretary of the Department of Labor and that the said Secretary of Labor affirmed the excluding decision of the said Commissioner of Immigration for the port of San Francisco.

Your petitioner therefore alleges, upon his information and belief, that the said action of the said Commissioner of Immigration and the said Secretary of Labor was in excess of their jurisdiction and the powers conferred upon them by statute, in this, that the said detained, having presented the evidence required by the said Section 2 hereinbefore mentioned, it was the duty of the said Commissioner of Immigration and the duty of the said Secretary of Labor to have permitted the said detained to reenter the United States as such returning Chinese merchant, and that their excluding decision was in violation of and in excess of the statutory authority vested in them, in this, that the said Section 2 of said Act of November 3d, 1893, provides: "That the term 'merchant' as employed herein and the acts of which this is amendatory shall have the following meaning and none other." And that [8] the said detained having complied with the said act and having submitted the evidence required by the said Section 2 and from the witnesses therein required, that the said Commissioner of Immigration and the said Secretary of Labor should have ordered and directed the re-admission of the said detained into the United States, and that no other action would have been in excess of and in violation of their statutory author-

ity. That for said reason their said excluding decisions are null and void and without effect.

Your petitioner further alleges upon his information and belief that the said Chin Fong entered the United States in a lawful manner during the year 1897 upon a merchant's paper issued under the provisions of Section 6 of the Act of Congress of May 6th, 1882, aforesaid, as amended and added to by the Act of Congress of July 5th, 1884, and that to facilitate in establishing the issuance of the said certificate and as evidence that the said detained would become a merchant in the United States after his arrival thereat, he had prepared and forwarded to him in China papers from the firm of Young Wah Hong Company, of the city of New York, State of New York, showing that the said detained would become a merchant and a member of the said firm upon his entry into the United States.

And your petitioner further alleges upon his information and belief that there was no fraud practiced in his said entry into the United States or in his subsequent residence therein.

And your petitioner further alleges that the said detained has never had a hearing before competent and legal authority invested with power to determine the matter as to whether his prior residence in the United States was legal or otherwise, or whether the method of his original entry into the United States was legal [9] or otherwise, and in this connection your petitioner further alleges upon his information and belief that the action of the said Commissioner of Immigration and of the said Secre-

tary of Labor in determining and deciding that the said detained had originally entered the United States in an illegal manner was without any supporting evidence, and was and is an abuse of discretion, and was without their authority and jurisdiction, and was in violation of Section 12 of the Act of Congress of May 6th, 1882, aforesaid, and in violation of the terms of Section 13 of the said Act of Congress of September 13th, 1888.

That attached hereto and made a part hereof is a complete copy of the Immigration Record of the application of the said detained to depart from and return to the United States as a Chinese merchant, together with the evidence given in support of his application to re-enter the United States, and that the same is filed separately herewith as Exhibit "A."

That it is the intention of the said Commissioner of Immigration to deport the said detained out of the United States on the steamer "Columbia," sailing from the Port of San Francisco on or about the 2d day of June, 1917, at the hour of one o'clock P. M. of said day, and unless this Court intervenes on behalf of the said detained, the said detained will on said date be deported out of and from the United States to the Republic of China.

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus may be granted herein, directed to the said Edward White, Commissioner of Immigration as aforesaid, commanding him to have the body of the said detained before your Honor at a time and place to be therein specified, to do and receive what shall then and there be commanded by

this Honorable Court concerning him, together with the time and cause of his detention, and said writ, [10] and that he may be restored to his liberty.

Dated San Francisco, California, May 24th, 1917.

CHIN GUY GET,
Petitioner.

GEO. A. McGOWAN,
Attorney for Petitioner.

United States of America,
State and Northern District of California,—ss.

Chin Guy Get, being first duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that the same has been read and explained to him, and he knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

CHIN GUY GET.

Subscribed and sworn to before me this 24th day of May, 1917.

[Seal] HARRY L. HORN,
Notary Public in and for the City and County of San Francisco, State of California.

Due service and receipt of a copy of the within petition and order is hereby admitted this 29 day of May, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.
CHAS. D. MAYER,
For EDWARD WHITE, Commissioner of Immigration.

[Endorsed]: Filed May 25, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[11]**

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

No. 16,205.

In the Matter of CHIN FONG (13,137½ Ex. S. S. "PERSIA," Dec. 23, 1913), on Habeas Corpus.

Amendment to Petition for Writ.

Comes now the petitioner in the above-entitled action, and files and presents this, his amendment to the petition for a writ of habeas corpus on file herein, i. e., by adding thereto on page 8 thereof, after the paragraph which is concluded on line 16 of said page, the following paragraph:

> Your petitioner alleges on his information and belief, that the said detained has been, for upwards of two and one-half (2½) years last past, and prior to the application for this writ of habeas corpus, a Chinese merchant, lawfully domiciled within the United States of America, and a member of the said firm of Quong Mow Lan & Company, which is and was a firm engaged in buying and selling and dealing in merchandise, at a fixed place of business, to wit: at No. 8 Pell Street, in the Borough of Manhattan, City of New York, State of New York, and that during said time he has engaged in the

performance of no manual labor of any kind or description whatsoever, except what was incumbent upon him in his conduct as such merchant, and that the detained has been such a merchant, as aforesaid, during his residence within the United States, upon bond, until his surrender into custody, just prior to the presentation of the petition for a writ of habeas corpus herein.

WHEREFORE, your petitioner prays judgment, as set forth in the original petition on file herein, of which the foregoing is an amendment.

Dated San Francisco, California, May 28th, 1917.

CHIN GUY GET,
Petitioner. [12]

United States of America,
State and Northern District of California,—ss.

Chin Guy Get, being first duly sworn, deposes and says:

That he is the petitioner in the foregoing amendment to petition; that the same has been read and explained to him, and he knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

CHIN GUY GET.

Subscribed and sworn to before me this 28th day of May, 1917.

[Seal] HARRY L. HORN,
Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Due service and receipt of a copy of the within amendment to petition is hereby admitted this 29 day of May, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.
CHAS. D. MAYER,
For EDWARD WHITE, Commissioner of Immigration.

Filed May 28, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [13]

In the District Court of the United States, in and for Northern District of the State of California, Division No. 1.

No. 16,205.

In the Matter of CHIN FONG (13,137½ Ex. S. S. "PERSIA," Dec. 23, 1913), on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the port and district of San Francisco, appear before this court on the 2 day of June, 1917, at the hour of 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as herein prayed for, and that a copy of this order be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Chin Fong, are hereby ordered and directed to retain the said Chin Fong, within the custody of the said Commissioner of Immigration, and within the jurisdiction of this court until its further order herein.

Dated San Francisco, California, May 28, 1917.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed May 28, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[14]**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,205.

In the Matter of CHIN FONG, on Habeas Corpus.

Return to Order to Show Cause.

Now comes Edward White, Commissioner of Immigration at the port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the order to show cause, issued by the said court on the petition of Chin Guy Get for writ of habeas corpus, and to said petition admits, denies and alleges as follows:

Denies that the said detained is unlawfully imprisoned, detained, confined and restrained, or un-

lawfully imprisoned or detained or confined or restrained of his liberty by Edward White, Commissioner of Immigration at the Port of San Francisco, or otherwise, or at all.

As to the following allegation on page 2 of said petition, viz., "That it is admitted by the said Commissioner of Immigration and the said Secretary that the said detained was admissible into the United States under the Act of Congress approved February 20th, 1907, as amended by the Act of March 6th, 1910, commonly known as the General Immigration laws thereof," respondent has no information or belief concerning the said allegation sufficient to enable him to answer the same, and basing his answer upon said lack of information, denies the same. And in this connection respondent alleges that the admissibility of the said detained has never been passed upon by a Board of Special Inquiry as provided for by the said Immigration [15] Laws, and that the said detained is still subject to an investigation by said Board.

Denies that the hearing and proceedings or hearing or proceedings had herein or the action of the said Commissioner or the action of the said Secretary, was and is or was or is in excess of the authority committed to them by the statutes, rules and regulations.

Further denies that the denial of the application of the said detained to re-enter the United States as a resident Chinese merchant and lawfully domiciled therein was and is, or was or is, an abuse of the authority committed to them by the said statutes in

each or any of the particulars set forth in said petition.

Denies that the reports of the Immigration Inspector in charge of the Chinese Division of the Immigration Service in the City of New York was in substance and effect, or in substance or effect that the mercantile status of the said detained for the year prior to his departure aforesaid for China had been established in full and complete compliance with the provisions of Section 2 of the Act of Congress of November 3d, 1893, or otherwise, or at all.

Denies that the said Commissioner of Immigration denied the application of the said detained to re-enter the United States for the reason that the said detained did not satisfactorily account to the said Commissioner of Immigration for the present whereabouts of the papers upon which the detained claimed to have originally been admitted into the United States. And in this connection respondent alleges that the said denial was based not only upon the failure of detained to produce said papers, but also upon the failure of the detained otherwise to satisfactorily show that his entry into the United States was lawful.

And as a further and separate answer in this connection, [16] respondent alleges that after a full and fair hearing was accorded the detained upon his application to re-enter the United States, the Commissioner of Immigration found as follows:

13,137½.

In the Matter of CHIN FONG, SS. "PERSIA," December 23, 1913.

Application to Land as a Returning Merchant (viséed), New York.

FINDING AND DECREE.

The applicant applied for preinvestigation of his alleged status as a merchant (Form 431), in December, 1911, but his application was denied by the Seattle office, and an appeal from that decision dismissed by the Bureau for the reason that it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the United States, it having been claimed by him that he entered this country at or near Niagara Falls, New York, in 1897, on "merchant's papers" sent to him in China by the Young Wah Hong Company at New York. It was first claimed by the applicant, in the present case, that he was admitted at Niagara Falls in 1906, but when confronted with his previous testimony he denied the last-mentioned statement and reiterated the year first-mentioned as the date of his original entry, and stated that he was then admitted as a section six Canton merchant on papers secured by him in that city.

Niagara Falls was not a port of entry for Chinese in 1906, and the applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful; and as the Bureau has sustained the

action of the Seattle office in refusing his application for Form 431, the applicant is denied admission and advised of his right of appeal.

Dated this 6th day of February, 1914.

(Signed) SAMUEL W. BACKUS,
Commissioner.

WHW/ASH.

And upon due consideration of the appeal to the Secretary of Labor from the finding of the Commissioner of Immigration, the Acting Secretary of Labor found:

No. 53,725/44.

Washington, March 6, 1914.

In Re Case of CHIN FONG.

I am satisfied that the action recommended by the Bureau is the correct one in this case.

The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to [17] remain in this country constitutes no waiver of the right to deport him, and the fact that the government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the government from exercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance.

This case appears to be quite fairly within the Mack Fock decision which, in my opinion, is correct.

The recommendation that admission be denied is approved.

J. B. DINSMORE,
Acting Secretary.

JBD/G.

Denies that the action of the said Commissioner of Immigration and the said Secretary of Labor, or the Commissioner of Immigration or the Secretary of Labor was in excess of their jurisdiction and the powers conferred upon them by statute.

Denies that the excluding decision of the said Commissioner of Immigration was in violation of, or in excess of the statutory authority vested in him.

Denies that the said Commissioner of Immigration and the said Secretary of Labor, or the said Commissioner of Immigration or the said Secretary of Labor should have ordered and directed, or ordered or directed the readmission of the detained into the United States, and further denies that the said excluding decision or decisions are null and void, or null or void, and without effect.

Denies that Chin Fong entered the United States in a lawful manner during the year 1897 or at any other time upon a merchant's paper or otherwise.

Denies that there was no fraud practiced in the entry of the said detained into the United States or in his subsequent residence therein. [18]

Denies that said detained has never had a hearing before a competent and legal or competent or legal authority invested with the power to determine the

matter as to whether his prior residence in the United States was legal or otherwise, or whether the method of his original entry into the United States was legal or otherwise.

Denies that the action of the said Commissioner of Immigration and the Secretary of Labor, or the said Commissioner of Immigration or the said Secretary of Labor in determining and deciding or determining or deciding that the said detained had originally entered the United States in an illegal manner was without any supporting evidence.

Further denies that said action was and is, or was or is, an abuse of discretion and was without their authority and jurisdiction or their authority or jurisdiction, and further denies that said action was in violation of section 12 of the Act of Congress of May 6th, 1882, or of any other act or in any way contrary to law.

As to the amendment to the petition on file herein, respondent in answering the same, denies that the said detained has been for upwards of two and one-half years last past and prior to the application for a writ of habeas corpus or otherwise or at all, a Chinese merchant lawfully domiciled within the United States of America, and a member of the firm of Kwong Mow Lan & Company or of any other firm or company domiciled or doing business in the United States of America.

As a further, separate and distinct answer and defense to the petition on file herein, respondent alleges that on March 9th, 1914, a petition for writ of habeas corpus was filed on behalf of said detained

in the above-entitled court; that a [19] demurrer was interposed to said petition, which said demurrer was sustained. That shortly thereafter, and on or about the 4th day of June, 1914, said detained filed an order allowing an appeal from the order of said Court sustaining said demurrer, to the Supreme Court of the United States, and a mandate was issued from the Supreme Court of the United States and spread upon the minutes of the above-entitled court on June 7th, 1916, dismissing said appeal, and the above-entitled Court ordered said applicant surrendered to the officers for deportation on or about the 1st day of July, 1916.

That although frequent requests were made on the part of the Government to have said detained surrendered, it was not until on or about May 24th, 1917, that said detained was surrendered to the Government officials.

That the petition for writ of habeas corpus now on file herein, covers no additional facts and raises no questions of fact or points of law other than those raised in the original petition for writ of habeas corpus which have already been determined by said Court, other than those already referred to in this answer.

WHEREFORE, respondent prays that said petition for a writ of habeas corpus be denied, and the order to show cause be discharged and that said alien be remanded to the custody of the respondent for deportation, as provided for in said warrant of deportation heretofore issued by the Secretary of Labor of the United States and for such other and

further relief as to this Court seems just and equitable.

JNO W. PRESTON,
United States Attorney,
CASPER A. ORNBAUN,
Assistant U. S. Attorney,
Attorneys for Respondent. [20]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Charles D. Mayer being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all the facts set forth in the within return to petition for writ of habeas corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiant's own knowledge the matters set forth in the return to the petition for writ of habeas corpus are true, excepting those matters which are stated on information and belief, and that as to those matters he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 7th day of June, 1917.

[Seal] T. L. BALDWIN,
Deputy Clerk, U. S. District Court Northern District of California.

[Endorsed]: Presented in open court and filed June 7th, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [21]

At a stated term of the District Court of the United States, for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 7th day of June, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable M. T. DOOLING, Judge.

No. 16,205.

In the Matter of CHIN FONG on Habeas Corpus.

(Order Denying Petition for Writ of Habeas Corpus.)

This matter came on regularly this day for hearing of the order to show cause as to the issuance of a writ of habeas corpus herein. C. A. Ornbaun, Esq., Assistant United States, was present for and on behalf of Respondent and filed a return to said petition. Geo. A. McGowan, Esq., was present as attorney for and on behalf of petitioner and detained. On his motion, the Court ordered that petitioner be and is hereby allowed to hereafter file a traverse to said return *nunc pro tunc* as of to-day, June 7th, 1917. Said matter was thereupon argued by said attorneys and submitted. After due consideration had thereon, further ordered that said Petition for a writ of habeas corpus be, and the same is hereby denied and that the order to show cause be discharged accordingly. [22]

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

16,205.

In the Matter of CHIN FONG (13,137/½, Ex. SS. "PERSIA," December 23, 1913), on Habeas Corpus.

Exceptions on Behalf of Petitioner.

Now comes Chin Fong, the petitioner and the detained in the above-entitled proceeding and does hereby except to the decision and order of the above-entitled court:

FIRST.

In holding and deciding that the Commissioner of Immigration and the Secretary of Labor had jurisdiction in a proceeding of a Chinese alien seeking readmission into the United States as a Chinese merchant having a lawful domicile therein, to consider and determine in said admission proceeding whether the said Chinese alien had originally entered the United States in a legal manner, approximately fifteen years prior to his departure from the United States, on said temporary visit to China, and upon their deciding that said original entry was fraudulent to thus deprive and prevent the alien from having that fact investigated and determined by a Justice, Judge or Commissioner of a Court of the United States.

SECOND.

In holding and deciding that the Commissioner of

Immigration and the Secretary of Labor could deny the petitioner, a Chinese alien, re-entry into the United States, after a temporary visit [23] to China, he having presented the testimony of two credible witnesses other than Chinese that he was engaged in business as a Chinese merchant, which business was conducted in his own name, and wherein he was engaged in buying, selling and dealing in merchandise at a fixed place of business for more than one year prior to his departure for China, and that during said period of one year, he had engaged in the performance of no manual labor of any kind or description, save and except only such duties as were incumbent upon him in his conduct as such merchant, and that the said mercantile establishment had no prohibitive features, and was a *bona fide* mercantile establishment, and that his interest therein still continues.

THIRD.

In holding and deciding that an alien Chinese person, while at liberty under bond in a court proceeding to determine the legality of his claim of readmission into the United States, cannot be heard in a subsequent *habeas corpus* proceeding to assert a mercantile status pursued and continued during his release on bond, in defense of the Government's prior refusal to permit him to re-enter the United States.

FOURTH.

In holding and deciding that the detained was not entitled to a hearing before this Court in this proceeding, upon the question whether or not his origi-

nal entry into the United States about fifteen years prior thereto, was legal or not.

FIFTH.

In dismissing the order to show cause, and denying the petition for a writ of habeas corpus herein.

Dated June 7th, 1917.

GEO. A. McGOWAN,
Attorney for Petitioner. [24]

The above and foregoing exceptions are hereby allowed.

Dated June 8th, 1917.

M. T. DOOLING,
United States District Judge.

Due service and receipt of a copy of the within exceptions and order allowing same is hereby admitted this 8th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed Jun. 8, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [25]

In the District Court of the United States, in and for the Northern District of California, Southern Division, No. 1.

16,205.

In the Mater of CHIN FONG (13,137/½, Ex. SS. "PERSIA," December 23, 1913), on Habeas Corpus.

Stipulation and Order Approving Statement of the Case and Agreed Statement of Facts With Respect Thereto.

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that on the 7th day of June, 1917, the above-entitled matter came on regularly to be heard before this Court sitting without a jury, George A. McGowan, representing the petitioner, and Caspar Ornbaum, Assistant United States Attorney in and for the Northern District of California representing Edward White, the Commissioner of Immigration of the port and district of San Francisco, and that the following is an agreed statement of facts or statement of the case in the above-entitled matter, that is to say:

This matter herein being a hearing upon the return to an order to show cause why a writ of habeas corpus should not issue in pursuance to the prayer contained in the petition for a writ of habeas corpus filed herein, the Assistant United States Attorney presented and filed the return to the order to show cause of the said Edward White, Commissioner of Immigration, as aforesaid. A hearing was then had upon the issues joined wherein judgment was asked for upon the record upon behalf of the petitioner, and the petitioner further offered to prove certain facts through witnesses to the Court, which offer was denied, and after argument by counsel the Court took [26] the matter under advisement, and thereupon, to wit: on the seventh day of June, 1917, rendered its decision dismissing the order to

show cause, and denying the application for a writ of habeas corpus as prayed for in the said petition.

That during the proceedings in said matter and during the hearing thereof certain motions and offers were made by the petitioner and certain rulings were made by the Court, all of which will more fully appear from the record of the proceedings had in said matter, which beginning immediately upon the filing of the return in open court and containing all of the proceedings in evidence given and introduced in said matter is as follows:

Mr. McGOWAN.—It is stipulated by and between counsel for the petitioner and the respondent, that the immigration record consisting of Exhibit "A" attached to the petition on file herein as supplemented by the proceedings before the Department of Labor at Washington as set forth in the return herein constitutes and is the record of the proceedings upon behalf of the detained Chin Fong to reenter the United States as the same was had and had theretofore taken place before the Immigration authorities of the United States of America, and by consent of both parties the said record and proceedings were introduced in evidence.

Mr. ORNBAUN.—That is the understanding.

Mr. McGOWAN.—Upon behalf of the petitioner we now desire to ask for the judgment of this court discharging the petitioner from custody upon the pleadings and the record upon the following grounds:

First. That the Commissioner of Immigration and the Secretary of Labor are without jurisdiction

in a proceeding of a Chinese alien seeking readmission into the United States as a Chinese merchant having a lawful domicile therein to consider and determine in said admission proceedings whether said Chinese alien had [27] originally entered the United States in a legal manner, approximately fifteen years prior to his departure from the United States on said temporary visit to China, and upon their deciding that said original entry was fraudulent, to thus deprive and prevent the alien from having that fact investigated and determined by or before a Justice, Judge or Commissioner of a Court of the United States, all as shown by the immigration record herein.

Mr. ORNBAUN.—The respondent resists the motion.

The COURT.—The motion so far as it is based upon the ground indicated will be denied.

Mr. McGOWAN.—The petitioner reserves an exception.

(EXCEPTION No. 1.)

Mr. McGOWAN.—We ask for judgment secondly upon the ground that the Commissioner of Immigration and the Secretary of Labor cannot deny the petitioner, a Chinese alien, re-entry into the United States, after a temporary visit to China, he having presented the testimony of two credible witnesses other than Chinese, that he was engaged in business as a Chinese merchant, which business was conducted in his own name, and wherein he was engaged in buying, selling and dealing in merchandise at a fixed place of business for more than one year

prior to his departure for China, and that during said period of one year, he had engaged in the performance of no manual labor of any kind or description, save and except only such duties as were incumbent upon him in his conduct as such merchant, and that the said mercantile establishment had no prohibitive features, and was a *bona fide* mercantile establishment, and that the interest of the detained therein still continues, all as shown by the immigration record herein.

Mr. ORNBAUN.—The respondent resists the motion.

The COURT.—The motion so far as it is based upon the ground indicated is denied. [28]

Mr. McGOWAN.—The petitioner reserves an exception.

(EXCEPTION No. 2.)

Mr. McGOWAN.—It appears from the return of the Respondent that the petitioner in this matter was at liberty upon bail, after applying to re-enter the United States, from about the 4th day of June, 1914, up to shortly before he was surrendered into custody prior to the commencement of this present proceeding and supplementing the facts now of record and in evidence before the Court, we desire to present suitable and competent testimony for the purpose of showing that during said time this detained was engaged in business in New York as a merchant following an exempt status as a Chinese merchant in the same manner and in the same way as he had been doing prior to his departure on a temporary visit to China.

Mr. ORNBAUN.—The respondent objects to the reception of evidence of that kind claiming it is entirely immaterial, incompetent and irrelevant.

The COURT.—The objection will be sustained.

Mr. McGOWAN.—The petitioner reserves an exception.

Mr. McGOWAN.—We now desire to ask upon behalf of this petitioner that this Court accord us a hearing in this present proceeding upon the question whether or not the detained's original entry into the United States about fifteen years ago was legal or not. We now have competent evidence to present to show that this said entry was in a legal manner.

Mr. ORNBAUN.—The respondent submits that the Court is without jurisdiction to receive evidence upon that point.

The COURT.—The Court denies such a hearing as requested holding that that question was and is for the immigration officers to determine.

Mr. McGOWAN.—The petitioner reserves an exception.

(EXCEPTION No. 4.) [29]

Mr. McGOWAN.—There is nothing further to present.

Mr. ORNBAUN.—The Government rests.

The COURT.—The order to show cause will be dismissed and the petition for a writ of habeas corpus denied.

Mr. McGOWAN.—The petitioner reserves an exception.

(EXCEPTION No. 5.)

The undersigned attorneys for the respective parties hereto do hereby stipulate and agree that the foregoing is and does constitute the agreed statement of facts or statement of the case in the above-entitled matter, and we hereby agree to the statement and the allowance and approval of same by the Judge of the above-entitled court.

Dated San Francisco, California, January 24th, 1918.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.
JNO. W. PRESTON,
Attorney for Respondent and Appellee.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the statement of the case or agreed statement of facts as recited in the foregoing stipulation is hereby settled, allowed and approved as therein set forth.

Dated San Francisco, California, January 24, 1918.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Apr. 8, 1918. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [30]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Division No. 1.

In the Matter of CHIN FONG (13,137½, Ex. SS. "PERSIA," December 23, 1913), on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court and to the Honorable John W. Preston, United States Attorney for the Northern District of California.

You and each of you will please take notice that Chin Fong, the petitioner and the detained, above named, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, from the *other* made and entered herein on the 7th day of June, 1917, denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 7th, 1917.

GEO. A. McGOWAN,

Attorney for Petitioner and Detained and Appellant. [31]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Division No. 1.

In the Matter of CHIN FONG (13,137½, Ex. SS. "PERSIA," December 23, 1913), on Habeas Corpus.

Petition for Appeal.

Now comes Chin Fong, the petitioner, the detained and the appellant herein, and says:

That on the 7th day of June, 1917, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof; and further, that the said detained be admitted to bail during the pendency of the appeal herein, upon giving a bond before a Commissioner of this Court, in the sum of Fifteen Hundred Dollars ($1500) conditioned that he will return and surrender himself [32] in execution of whatever judgment may be finally entered herein.

Dated at San Francisco, California, June 7th, 1917.

GEO. A. McGOWAN,

Attorney for Petitioner, Detained and Appellant.

[33]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, First Division.

In the Matter of CHIN FONG, (13,137/½ Ex. S. S. "PERSIA," December 23, 1913), on Habeas Corpus.

Assignment of Errors.

Comes now, Chin Fong, by his attorney, George A. McGowan, Esquire, in connection with his petition, for an appeal herein, assign the following errors, which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

FIRST. That the Court erred in denying the petition for a writ of habeas corpus herein.

SECOND. That the Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

THIRD. That the Court erred in not holding that the allegation contained in the petition herein for a writ of habeas corpus, were sufficient in law, to justify the granting and issuing of a writ of habeas corpus, as prayed for in said petition.

FOURTH. That the Court erred in not holding that the Commissioner of Immigration and Secretary of Labor, acted beyond their [34] statutory authority and without jurisdiction in denying the application of the detained to re-enter the United States he having established to their satisfaction, his

status as a Chinese merchant for one year, prior to his departure for China.

FIFTH. *The* the Court erred in holding that it was within the statutory authority and within the jurisdiction of the said Commissioner, and the said Secretary of Labor, to examine into the legality of the residence of the said detained within the United States, prior to the one year immediately preceding his departure upon said temporary visit to China.

SIXTH. That the Court erred in holding that the detained could not be permitted to urge his mercantile status acquired during his release on bond, in defense of his present right of residence in the United States.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the Clerk of the said Court on the 7th day of June, 1917, discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed, and that this cause be remitted to the said lower court with instructions to discharge the said Chin Fong from custody, or grant him a new trial before the lower court, by directing the issuance of a writ of habeas corpus, as prayed for in said petition.

Dated San Francisco, California, June 7th, 1917.

GEO. A. McGOWAN,
Attorney for Appellant.

Due service and receipt of a copy of the within notice and petition for appeal and assignment of er-

rors is hereby admitted this 8th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California.
Attorney for Respondent.

[Endorsed]: Filed Jun. 8, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[35]**

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, First Division.

(No. 16,205.)

In the Matter of CHIN FONG (13,137/½ Ex. S. S. "PERSIA," December 23, 1913), on Habeas Corpus.

Order Allowing Petition for Appeal (and Releasing on Bond.)

On this 7th day of June, 1917, come Chin Fong, the detained herein, by his Attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court, his petition, praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and orders execution and remand stayed pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, that the appellant may be released upon bond, in the sum of One Thousand Five Hundred Dollars ($1,500) and that he remain within the United States, and render himself in execution of whatever judgment is finally entered herein at the termination of said appeal, and that the United States Marshal for this District is authorized to take **[36]** the detained into his custody for the purpose of effecting his release upon said bond.

Dated San Francisco, California, June 8th, 1917.

M. T. DOOLING,
U. S. District Judge.

Due service and receipt of a copy of the within Order Allowing Appeal and Releasing on Bond is hereby admitted this 8th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

[Endorsed]: Filed, Jun. 8, 1917. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. **[37]**

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 55 pages, numbered from 1 to 55, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the matter of Chin Fong. On Habeas Corpus, No. 16,205, as the same now remain on file and of record in the office of the Clerk of said District Court, said transcript having been prepared pursuant to and in accordance with the praecipe for record on appeal (copy of which is embodied in this transcript) and the instructions of Geo. A. McGowan, Esq., attorney for the petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of Twenty-one Dollars and Eighty-five cents ($21.85) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original citation on appeal, issued herein (page 57).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of June, A. D. 1918.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk.

CMT. [56]

(Citation on Appeal—Original.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Edward White, as Commissioner of Immigration, for the Port of San Francisco, and to John W. Preston, U. S. Attorney for Northern District of California, His Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Chin Fong is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS.—the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, Southern Division, Div. No. 1, this 8th day of June, A. D. 1917.

M. T. DOOLING,
United States District Judge.

Due service of the within Citation on Appeal

and receipt of a copy thereof is hereby admitted this 8th day of June, 1917.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Respondent.

This is to certify that a copy of the within Citation on Appeal was this day lodged with the undersigned as the clerk of the above-entitled court.

Dated June 8th, 1917.

[Seal] W. B. MALING,
Clerk of the United States District Court in and for the Northern District of California, Southern Division, Division No. 1.

By T. L. Baldwin,
Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: No. 16,205. United States District Court for the Northern District of California, Southern Division, Div. No. 1. In the Matter of Ching Fong on Habeas Corpus, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Citation on Appeal. Filed Jun. 8, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [57]

[Endorsed]: No. 3180. United States Circuit Court of Appeals for the Ninth Circuit. Chin Fong, Appellant, vs. Edward White, as Commissioner of Immigration for the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the

Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 12, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

CHIN FONG,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration, of the Port of San Francisco,

Appellee.

Stipulation Omitting Certain Orders from Printed Transcript of Record.

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that in the printing of the transcript of record herein as the same is now on file with the clerk of this court, the following orders may be omitted from the printed copy of said record:

Citation on Appeal—Copy (Tr. page 38).

Bond for appearance on appeal (Tr. pages 39, 40).

Stipulations and orders extending time to docket case covering the following periods of time:

July 7, 1917, to August 6, 1917 (Tr. page 41).

August 4, 1917, to August 29, 1917 (Tr. page 42).

August 28, 1917, to September 1, 1917 to be printed (Tr. pages 43, 44).

September 1, 1917, to October 1, 1917 (Tr. page 45).

September 29, 1917, to October 29, 1917 (Tr. page 46).

October 29, 1917, to November 28, 1917 (Tr. page 47).

November 27, 1917, to December 27, 1917 (Tr. page 48).

December 27, 1917, to January 16, 1918 (Tr. page 49).

January 16, 1918, to February 15, 1918 (Tr. page 50).

February 14, 1918, to March 16, 1918 (Tr. page 51).

March 16, 1918, to April 15, 1918 (Tr. page 52).

April 15, 1918, to May 15, 1918 (Tr. page 53).

May 15, 1918, to June 14, 1918 (Tr. page 54).

June 14, 1918, to July 14, 1918 (Tr. page 55).

And Exhibit "A" filed with petition for writ may be omitted.

It is further stipulated and agreed that this stipulation be printed in the transcript of record.

Dated July 20, 1918.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

JNO. W. PRESTON,
United States Attorney for the Northern District of California,
Attorney for Respondent.

[Endorsed]: No. 3180. In the United States Circuit Court of Appeals for the Ninth Circuit. Chin Fong, Appellant, vs. Edward White, Commissioner of Immigration of the Port of San Francisco, Appellee. Stipulation Omitting Certain Orders from Printed Transcript of Record. Filed Jul. 22, 1918. F. D. Monckton, Clerk.

No. 3180

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re
CHIN FONG,
On Habeas Corpus,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLANT.

GEORGE A. McGOWAN,
Bank of Italy Building, San Francisco,
Attorney for Appellant.

No. 3180

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In re
CHIN FONG,
On Habeas Corpus,
Appellant,
vs.
EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco, California,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

Chin Fong, the appellant herein, is an alien Chinese person seeking to re-enter the United States through the Port of San Francisco after a temporary absence in China. The ground of re-admission is that Chin Fong was returning to a previously established commercial domicile in this country. The rejection by the Immigration authorities was upon the ground that notwithstanding the production of the statutory evidence as to mercantile status for one year prior to departure, the legality of the residence of Chin Fong prior to the said period of

one year was not established to their satisfaction and the application was for said reason denied. This briefly is the ground for the adverse decision of the Commissioner of Immigration and affirmed upon appeal to the Secretary of Labor. The adverse decision of the then Commissioner of Immigration, Samuel W. Backus, appears in the Immigration Record, and has also been set out in the return of the respondent and is as follows:

"Finding and Decree.

The applicant applied for preinvestigation of his alleged status as a merchant (Form 431) in December, 1911, but his application was denied by the Seattle office, and an appeal from that decision dismissed by the Bureau for the reason that it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the United States, it having been claimed by him that he entered this country at or near Niagara Falls, New York, in 1897, on 'merchant's papers' sent to him in China by the Young Wah Hong Company at New York. It was first claimed by the applicant in the present case, that he was admitted at Niagara Falls in 1906, but when confronted with his previous testimony he denied the last mentioned statement and reiterated the year first mentioned as the date of his original entry, and stated that he was then admitted as a section six Canton merchant on papers secured by him in that city.

Niagara Falls was not a port of entry for Chinese in 1906, and the applicant has not satisfactorily accounted for the present whereabouts of the papers on which he claims to have been admitted, so that it must be concluded that his domicile in this country was unlawful; and as the Bureau has sustained the action of the

Seattle office in refusing his application for Form 431, the applicant is denied admission and advised of his right of appeal.

Dated this 6th day of February, 1914.

(Signed) Samuel W. Backus,
Commissioner."

The adverse decision of the Acting Secretary of Labor is also set forth in the return, and is as follows:

"The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government from exercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance.

This case appears to be quite fairly within the Mack Fock decision which, in my opinion, is correct.

The recommendation that admission be denied is approved.

J. B. Dinsmore,
Acting Secretary."

A writ of habeas corpus was applied for and denied. The views of the lower court are reported in 213 Fed. 288. An appeal was taken to the Supreme Court of the United States upon the mis-

taken theory that the construction of a treaty was involved. The views of the court thereon are reported in 241 U. S. 1 wherein the appeal was dismissed for want of jurisdiction. Extracts from the opinion follow:

> "The appeal is direct from the District Court, and can only be sustained against the motion of the United States to dismiss for want of jurisdiction in this court if there is a substantial question under the constitution of the United States, or a treaty made under their authority, 238 of the Judicial Code (36 Stat. at L. 1157, chap. 231, Comp. Stat. 1913, 1215) permitting an appeal from a district court when a constitutional question is involved and in any case 'in which * * * the validity or construction of any treaty made under its (United States) authority is drawn in question.
>
> * * * * * * *
>
> We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty, and that the rights of petitioner can rest only upon the statutes regulating Chinese immigration. So concluding we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal, and whether he could acquire by either a status which the immigration officers were without power to disregard. Dismissed."

Upon permission of the lower court Chin Fong was permitted to again file a petition for a writ of habeas corpus, basing his claim for relief upon rights vested by the statute and not rights previously supposed to flow from the treaty with China. To this petition was annexed the Immi-

gration Record in the case of Chin Fong. An amendment to the petition was thereafter filed, an order to show cause was issued, and thereafter the respondent filed a return thereto. Upon the hearing had thereon five written exceptions were allowed upon behalf of Chin Fong to rulings by the lower court adversely to his legal contentions.

An agreed statement of facts by stipulation of counsel, approved by the lower court, as to the proceedings before the lower court upon the hearing appears of record. By stipulation and order the Immigration Record was withdrawn from the office of the clerk of the lower court and was filed with the clerk of this court for use upon this appeal.

The petition alleges that Chin Fong is applying for re-admission as a returning merchant previously engaged in business in New York City, and that he submitted the evidence required by statute. The statute in question is Section 2 of the Act of Congress of November 3, 1893 (28 Stat. at L. 7 Chap. 14, Comp. Stat. 1913 § 4324) and the part thereof that is relevant reads as follows:

> "The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

> Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing."

That portion of the report of the Inspector in charge of the New York office, H. R. Sisson, dated January 15, 1914, upon the testimony covering Chin Fong's mercantile status for the statutory period of one (1) year is as follows:

> "In view of the fact, however, that while this application was denied in January, 1912, he did not depart from the United States until November 23rd, 1912, a further investigation has been made covering this period, and attached to the record will be found in triplicate the sworn statement of Chin Fong, the manager of the firm, together with those of the statutory witnesses, Messrs. Israel Brand and John L. Delmonte, both of whom are business men, and so far as this office knows, reputable. * * *
>
> Kwong Mow Lan & Co. are engaged in manufacturing cigars at No. 8 Pell street, where they also dispose of them at retail as well as wholesale, and it is believed to be a bona fide establishment. H. S. Sisson, Inspector in charge."

The views of the lower court thereon may be found in the opinion on the first application for a writ (213 Fed. 288):

> "Dooling, District Judge. The petition shows that petitioner, Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a preinvestigation as to his status as a merchant, and a certificate was denied him, on the ground that his original entry into this country was surreptitious; that, notwithstanding this denial, the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his claim; that notwithstanding these facts, he has been denied admission and ordered deported on the same ground that his preinvestigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge or commissioner.
>
> This, briefly stated, is the body of the present petition for a writ of habeas corpus. To this petition a demurrer has been interposed. I am of the opinion that the demurrer must be sustained. Had the petitioner been content to remain in this country he could have been deported only after a hearing before a justice, judge or commissioner. But as he left the country voluntarily and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines in the case of a Chi-

nese applying to enter from that of one already in this country, whom it is sought to deport, under the exclusion laws.

The demurrer will therefore be sustained, and the application for a writ denied."

While the petition alleges that the detained has presented the evidence required by statute of a returning Chinese merchant, the return makes denial of this allegation. The return, however, is to be interpreted in the light of what is contained in the Immigration Record. I do not understand that the respondent takes any exception to the sufficiency of the evidence presented upon behalf of the detained touching his mercantile status in this country for a period of one year prior to his departure other than as the same may be affected by the antecedent question as to whether or not his former residence in this country had a legal foundation. In other words, it is the contention of the Immigration Department that Section 2 of the Act of November 3, 1893, supra, is to be construed as containing an additional requirement other than those appearing upon the face thereof substantially to the effect that the person claiming to be such returning merchant must also have legally entered the United States in the first instance, and that the Immigration authorities in an admission case were also vested with authority and had jurisdiction to determine the question of the legality of the returning merchant's residence prior to the period of one year mentioned in the statute. The respondent claims that these disputed powers exercised by him

are contained in said Section 2 of the Act of November 3, 1893, and that the said disputed powers though not visible on the face thereof, are to be found in a proper statutory construction of the said section. The petitioner claims that the exercise of these disputed powers is not the result of statutory construction but really amounts to *legislation,* which is a function reserved for Congress and not conferred upon the Immigration authorities.

The petition next alleges that the detained first entered the United States during the year 1897 in a legal manner and without fraud, upon the production by him of a merchant's certificate issued in China under the terms of Section 6 of the Act of Congress of July 5, 1884, and that prior thereto and to facilitate in the issuance thereof, by showing to the authorities in China that in the event of his being permitted to go to the United States he would follow a mercantile pursuit there, he had had papers prepared by the firm of Young Wah Hong Co. of New York City, showing that he would become affiliated with that firm as a merchant upon his subsequent arrival here. The respondent denies this allegation in his return. Upon the hearing the court declined upon jurisdictional grounds to receive evidence from the petitioner to support this averment.

The petitioner finally alleges that the detained has never in this proceeding had a hearing before competent and legal authority invested with power to determine the matter as to whether his prior

(ante-dating the statutory period of one year) residence in this country was legal or otherwise or whether his original entry into the United States was legal or otherwise, and that the action of the Immigration authorities in so adversely determining, usurped the functions vested in the Federal Judiciary by Section 12 of the Act of Congress of May 6, 1882, and Section 13 of the Act of Congress of September 13, 1888. The denial of this allegation by the respondent is based upon their construction of the statutes that in an admission case they are additionally invested with powers which in a deportation case may only be exercised by the judiciary, that is a justice, judge or commissioner.

In the amendment to the petition it is alleged that since Chin Fong's admission to bail in the earlier habeas corpus proceeding, a period of 2½ years, he has resumed his mercantile pursuits and been such a merchant of Kwong Mow Lan & Co. of New York. The return denies this. Upon the hearing the lower court refused upon jurisdictional grounds to receive evidence thereon in support thereof.

Argument.

While there are five exceptions taken in this case, exceptions Nos. 1, 2 and 4, are so co-related that they will be consolidated and treated as one point. The third exception is complete in itself. The fifth and last exception is a general one which may be considered as merged in the two points

which these five exceptions are resolved into. The enumeration follows:

FIRST.

Whether, in the case of a Chinese merchant, seeking readmission into the United States, after a temporary absence therefrom, the Immigration authorities have jurisdiction to refuse admission to the applicant, when he has submitted the evidence of two credible witnesses other than Chinese to the effect that he was a Chinese merchant, as defined by the Chinese Exclusion and Restriction Act for upwards of the period of one year prior to his departure from the United States, and, whether said authorities have exclusive, concurrent or in fact any jurisdiction in such admission proceedings, to pass upon the legality of the antecedent (prior to said period of one year) residence of such merchant, including whether he legally entered the United States approximately 15 years prior thereto, and by said act prevent such person from having his status ante-dating the said period of one year, heard, examined into and adjudicated by the judicial branch of the Government.

SECOND.

Whether a Chinese merchant released on bond in an admission proceeding may be heard to urge in a subsequent habeas corpus proceeding the fact that he has continued to follow an exempt mercantile status in his same mercantile establishment during the 2½ years which intervened between the

two said proceedings that he had been at large upon bond.

First: Let it be understood at the outset that this applicant does not question the authority of Congress to deal with aliens, either resident within the United States, or seeking re-admission thereto. The question at issue has not to do with the power or authority of Congress, but is concerned solely with the interpretation of actual Congressional legislation.

At the beginning of the policy of Chinese Restriction or Chinese Exclusion Congress foresaw that different questions would arise touching on the one hand the right of admission of Chinese persons, and on the other hand, the right of expulsion of Chinese persons. Thus we find in the first Act of May 6, 1882, as the same was shortly thereafter amended on July 5, 1884, that the provisions with respect to the admission of Chinese were confined to the EXECUTIVE branch of the Government, and are covered in Section 9 of the Act, whereas, when the question of the legality or illegality of the residence of Chinese persons within the United States is the point at issue, this was confined to the JUDICIAL branch of the Government, all as provided in Section 12 of said Act. Section 9 is as follows:

> "That before any Chinese passengers are landed from any such vessel, the Chinese inspector in charge, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no pas-

senger shall be allowed to land in the United States from such vessel in violation of law."

The material part of Section 12 is as follows:

"And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; * * *"

It may be contended that an attempt was made in subsequent legislation to broaden out the authority of the executive officers in admission cases. Thus we find the Act of September 13, 1888, provided in Section 12 thereof as follows:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States and his decision shall be subject to review by the secretary of the treasury and not otherwise."

This last mentioned Act of Congress, however, was not to go into effect until the ratification of the then pending treaty with China. The treaty in question was never ratified, and hence certain sections of this Act including Section 12 have been adjudicated by the Supreme Court of the United States never to have gone into effect. In Li Sing v. United States, 180 U. S. page 486, it is provided that:

"Without finding it necessary to say that there are no provisions in the Act of Septem-

> ber 13, 1888, which, from their nature, are binding on the courts, as existing statements of the legislative will, we are ready to hold that Section 12 of that Act cannot be so regarded."

There were a number of sections of this Act of Congress of September 13, 1888, which did go into effect, and the one which we are concerned in is Section 13, which had to do with the expulsion of Chinese persons from the United States, and which particular section has been specifically re-enacted in all continuing Chinese legislation. The part material to this inquiry is contained in the first paragraph thereof and is as follows:

> "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge or commissioner of any United States Court, returnable before any justice, judge or commissioner of a United States Court, or before any United States Court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came."

The next Chinese legislation, any portion of which is now in effect, is the Act of May 5, 1892, which is commonly known as the Geary or Chinese Registration Act. The enacting clause of this Act continued in force all existing Chinese legislation. Sections 2, 3 and 6 specifically re-enforce and bestow

new and additional jurisdiction on the judicial branch of the Government having to do with the deportation of Chinese persons out of the United States upon the question of the legality or illegality of their prior residence. The Chinese did not comply with this Geary Act and contested its constitutionality before the Supreme Court. The Act was upheld, and Congress passed the subsequent Act of November 3, 1893, which is popularly known as the McCreary Act, extending the time for registration of Chinese for a period of six months. It is this Amendatory Act of November 3, 1893, which continues and re-enacts the jurisdiction of the judicial branch of the Government, which also defines the term "merchant" as used in the Chinese Exclusion Acts and provides the exact manner and by what class of witnesses such Chinese merchant should establish the necessary facts to regain admission into the United States. In this Section 2 of the Amendatory Act, which is set forth in the statement of the case contained in this brief, no mention is made of authority or jurisdiction on the part of the executive officers to conduct an investigation for the purpose of determining anything with respect to such Chinese merchant excepting his status for the period of one year prior to his departure from this country. In the case of Chin Fong, this applicant, these executive officers have, as we contend, usurped jurisdiction and attempted to determine that Chin Fong illegally entered the United States in the latter part of 1896 or the early part of 1897,

which would be a matter of fifteen or sixteen years ante-dating his departure from the United States upon such temporary visit to China, which was in the year 1912. It is, of course, obvious that it is most important for this petitioner as to whether that point may only be determined by the judicial branch of the Government as he contends, or whether it may only be determined by the executive branch of the Government, as the respondent contends. The difference between these two methods of procedure was recently commented upon by the Supreme Court in an opinion written by Justice McKenna, wherein in the case of United States v. Woo Jan, 38 Sp. Ct. 207, it is held:

> "The remedies are too essentially different to be concurrent. And yet we are asked to decide that the law which permits the first, that is, permits the deportation of an alien simply upon the warrant or determination of an executive officer, is not an amendment or alteration of a law which prohibits it. And there can be no doubt of the result if such decision be made. The summary and direct remedy of Section 21 will always be used. No Chinese person will be given the formal procedure of the Exclusion Laws with their safeguards. The cases demonstrate this and we cannot believe that Congress was insensible of it and left it possible. Nor can we ascribe to Congress a deliberately deceptive obscurity and an intention, by the use of words which can be given a double sense, to grant a right that can have no assertion. We must, indeed, assume that section 43 was intended to be sufficient of itself—fully exclusive and controlling."

Before leaving this branch of the case it might be well to call attention to the fact that while the administrative officers held original jurisdiction to try and determine the right of Chinese persons to enter the United States within the statutory authority hereinbefore mentioned, their decision was not specifically made final by Congress, and hence all such applicants for admission, if they felt aggrieved by the adverse action of the executive authorities, had recourse to the judicial branch of the Government through the medium of a writ of habeas corpus. It was not until August 18, 1894 (28 Stat. pages 327-390), that in a rider to the General Appropriation Bill Congress provided as follows:

> "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor."

I have never heard any authority on the Chinese Exclusion or Restriction Acts who claimed that this last mentioned Act created any new authority, but on the contrary, it obviously merely rendered final and exclusive an authority which had been previously vested in the executive officers in question. The Supreme Court of the United States recently determined in the case of Low Wah Suey v. Backus, 225 U. S. 460, with respect to the finality of the decisions of executive officers as follows:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final."

This brings us to the point where this appellant contends that the action of the executive authorities in this case is not within the authority of the statute. It is obvious that this appellant has met every requirement imposed by the statute, which provides the terms and conditions upon which a Chinese merchant may re-enter the United States after a temporary absence abroad. There is nothing in this statute which vests the executive officers with power to investigate and determine whether or not such a returning merchant legally entered the United States, a matter of some fifteen or sixteen years prior to his departure upon said temporary visit to China, and it is therefore contended that the action of the said executive authorities in denying this returning merchant permission to re-enter the United States, after he has met the requirements of the statute as it affects returning Chinese merchants, and basing their denial upon reasons not confided to their jurisdiction by the section, that their action is for said reason null and void and

without their statutory authority. The petitioner claims that the exercise of these disputed powers is not the result of statutory construction, but really amounts to legislation, which is a function reserved for Congress, and not conferred upon the immigration authorities. In the case of Merrill v. Jones, 106 U.S. 466, the Supreme Court of the United States held, in an opinion written by Chief Justice Waite, as follows:-

> "The secretary of the treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the secretary. The statute clearly includes animals of all classes. The regulations seek to confine its operation to animals of 'superior stock'. This is manifestly an attempt to put into the body of the statute a limitation which congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes. The secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

~~without their statutory authority.~~ Circuit Judge Gilbert in the case of Leong Youk Tong, 90 Fed. 648, decides as follows:

> "If there has been a decision in this case such as the statute contemplates, the decision is final, and can be reversed only on appeal to the secretary of the treasury. This court has no authority, by writ of habeas corpus or otherwise, to review it. Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967. The courts have interfered only in cases where the applicant for admission was about to be deported under an order which denied him a hearing, or denied his right of appeal (In re Gottfried, 89 Fed. 9; In re Gin Fung, 89 Fed. 153; In re Monaco, 86 Fed. 117); and in cases where he has been denied the right to land for reasons which the law does not recognize as ground for his exclusion (In re Kornmehl, 87 Fed. 314). If, in this case the collector had in fact decided, as was indicated in his verbal statement to the petitioner's counsel, that the petitioner was a merchant, and, as such, entitled to admission into the United States, but that he was denied admission for some other reason not connected with his status as a merchant, and not by statute or treaty made a ground of exclusion, the order of deportation would undoubtedly be void. Such appeared to be the facts as they were set forth in the petition for the writ."

The damage done to this appellant by having the question of the legality or illegality of his residence in the United States ante-dating the period of one year prior to his departure therefrom passed upon by the administrative officers arises from the fact that these administrative officers as a proposition of law, hold that if the residence of a Chinese per-

son within the United States is for any reason illegal, that a legal status could never be predicated or based thereon. The judicial branch of the Government, on the contrary, have repeatedly held that a Chinese person or an alien illegally within the United States may thereafter acquire a legal and lawful residence in a variety of ways. There are a number of decisions bearing upon this point which were recently presented before this Honorable Court in the case of Gin Dock Sue v. United States, No. 2858, and it is the decision rendered by this Honorable Court in this last mentioned case upon which this appellant mainly relies. The legal status of Gin Dock Sue is distinguished from the legal status of Chin Fong in this that Gin Dock Sue did not satisfy the port officials that he was a merchant for a year prior to his departure for China. He was denied re-admission and the excluding decision was affirmed on appeal, so his right to re-admission had been adversely adjudicated by the competent administrative officials, when he escaped from detention, and after the lapse of many years he was arrested under a deportation proceeding before the judicial branch of the Government. The part of the decision bearing upon the mercantile status cites many of the earlier decisions of the Circuit Court of Appeals and other District Courts bearing upon the point in question, and it will be in the interests of expedition to give the entire decision of the Circuit Court of Appeals upon this point:

> "It is urged in support of the second contention that, appellant having remained within

the United States for the period of three years, he cannot now be deported, although his entry was irregular: This for two reasons, namely, (1) that he was not proceeded against within three years in pursuance of section 21 of the general act to regulate the immigration of aliens into the United States; and (2) that his status has been that of a merchant in the meantime—indeed, it is said, for six and a half years prior to the present hearing.

It is quite true that an alien may not be deported after three years' residence, who has violated no law except that he is here through an irregular entry, if he is not otherwise chargeable with personal immorality. United States vs. Wong You, 223 U. S. 67. In the present case, however, the appellant has been proceeded against within the three years. He was, in fact, proceeded against instantly upon his attempt to effect a re-entry, and his right to reenter was adjudged adversely to his contention. The three years have elapsed with this order and judgment standing against him, neither reversed nor annulled. In other words, the judgment in the meanwhile has been in effect declarative of his unlawful status, as being within the country surreptitiously.

This brings us to the inquiry whether, notwithstanding the order and judgment that he was without the right or privilege of re-entry, his remaining within the United States surreptitiously for more than three years, with the status of a merchant, cures his unlawful entry.

In Tsoi Sim vs. United States, 116 Fed. 920, which involved the right to remain in the United States of a Chinese woman who lawfully entered before the Chinese exclusion act was enacted, and remained there afterwards but failed to register as required, and was thereafter lawfully married to a citizen of the United States, it was held that, by reason

of her marriage, appellant took the status of her husband, and was not subject to deportation: the court assuming that she was subject to deportation previous to her marriage.

So it was held respecting a French woman who, pending proceedings for her deportation under the immigration laws, married a citizen of the United States, by reason of having taken the status of her husband, she was entitled to remain. Hopkins vs. Fachant, 130 Fed. 839.

In Ex parte Ow Guen, 148 Fed. 926, the relator, a Chinaman was a resident of this country before the adoption of the Chinese Exclusion Act. He went to China, leaving the affidavits of two white witnesses showing him to be a merchant in Lowell. On his return he was refused admission because, although a merchant in fact, he was said not to be in law, as he had been a laborer and remained unregistered. He came again, and applied for admission as a merchant, but was ordered deported because he had been an unregistered laborer. The court held that the relator, as an unregistered laborer was entitled to all the rights of a resident alien until proceeded against and deported, among others, the right to become a merchant, and that, when he became a merchant, he had all the rights of one under the law. This was not a case of curing an unlawful entry by becoming a merchant. It was merely a case in the end where, a Chinaman having applied to enter as a merchant, and having been denied entry on the ground that he had been formerly within the United States with the status of a laborer, it was declared that he had the right to change his status, and, having done so, in pursuance thereof had the right of re-entry as a merchant.

These cases are not controlling here. If appellant's re-entry had been surreptitious only, the case would be different. He came and applied for re-entry, and was adjudged not to be

> entitled thereto. After the judgment had gone against him, he escaped, and remained in the country in spite of the efforts to deport him in pursuance of the order and judgment of the Commissioner of Immigration. It does not seem to us that an unlawful resistance of a lawful order and judgment, however long continued, can have the effect to outlaw such order and judgment. It is not through the neglect of the Government that the order has not been executed, but through the adroitness of appellant in keeping himself secreted. We think, therefore, that, while appellant's long residence in this country might have cured a merely surreptitious entry, it does not cure an unlawful resistance of the judgment and order of deportation. To hold otherwise would be to encourage resistance to lawful authority."

Reverting now to the facts of the case of Chin Fong, we find that the Commissioner of Immigration in his finding and decree sets forth as follows:

> "That it was satisfactorily shown at that time that the applicant had fraudulently secured his original admission to the United States. * * * So that it must be concluded that his domicile in this country was unlawful."

Whereas the affirming decision by the Acting Secretary of Labor is in part as follows:

> "The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government from exercising its

> authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here can cure the fraud perpetrated by him in gaining admission in the first instance."

By referring to the testimony in the case itself, and giving the widest possible scope to the contention of the administrative officers of the Government, the most that can be drawn therefrom as a legal conclusion is that deduced by the lower court in its opinion wherein Judge Dooling decides:

> "* * * that notwithstanding these facts he has been denied admission and ordered deported on the same ground that his pre-investigation certificate was denied, that is to say, because his original entry was surreptitious. * * *"

So that in the last analysis we are confronted with a *maximum contention of the respondent that Chin Fong's original entry into this country in 1896 or 1897, or even as late as 1907, for that matter, was surreptitious. Merely this, and nothing more.* There is no evidence or finding or conclusion that Chin Fong has ever labored at any time during his residence in the United States. This Honorable Court in the Gin Dock Sue case has held that:

> *"if appellant's re-entry had been surreptitious only, the case would be different"*; * * * *"we think, therefore, that while appellant's long residence in this country might have cured a merely surreptitious entry,* it does not cure an unlawful resistance of the judgment and order of deportation."

We therefore contend that the sole point of law involved in this case as it affects *"a merely surreptitious entry"* has already been determined by this court in favor of this appellant, in the Gin Dock Sue case. There is no contention here that this appellant had been denied admission and thereafter escaped, which is the distinguishing feature in the Gin Dock Sue case.

Other cases illustrative of the point that a legal domicile and exempt status will be recognized in the absence of evidence showing a legal entry as well as where a prior residence was admitted to be illegal, are to be found in the following cases:

United States v. Wong Lung, 103 Fed. 794;
In re Russomanno, 128 Fed. 528;
In re Tom Hin, 149 Fed. 842;
Botis v. Davies, 173 Fed. 996;
United States v. Lee You Wing, 208 Fed. 166;
United States v. Lee You Wing, 211 Fed. 939.

So far in the presentation of this matter and for the purposes of the argument, I have not contested the point that the Immigration officials have claimed that Chin Fong's entrance into the United States was surreptitious or fraudulent. The appellant in fact does not make this concession, but contends that his entry into the United States was in a perfectly legal manner. The finding by the Immigration officials that his entry was surreptitious is

against the weight of the evidence and is a pure abuse of discretion. The Immigration officials base their conclusion of illegal entry upon the sole fact that this appellant claimed to have entered the United States as a Section 6 merchant in the latter part of 1896 or the first part of 1897, and the conclusion of illegality is based upon the fact that the applicant said the papers were sent to China to him from this country, whereas in point of fact, to have been a Section 6 Chinese merchant, they must have been made in China prior to his departure from that country for the United States. Exactly this same confusion with respect to such papers was before the Circuit Court of Appeals for the Second Circuit, in the case of U. S. v. Chin Len, reported in 187 Fed. 544, wherein the court treating the testimony of quite the same character held as follows:

> "The same observations are true regarding the alleged fraud in affixing the commissioner's seal and the perfectly obvious mistake of the relator in saying that he received the certificate when he was in China, evidently confusing it in his mind with a document to be obtained in Hong Kong before coming to this country."

In the present case we contend and felt that we should have had an opportunity of proving before the court that this appellant entered the United States as claimed by him in the latter part of 1896, upon a Section 6 certificate issued in China, but to facilitate in the issuance of this certificate papers had been prepared in the United States for the

purpose of showing that Chin Fong would become and be a merchant after his entry into the United States. Evidence of this fact would have at once exploded the theory of the Government that his entry was surreptitious or fraudulent.

When this appellant was an applicant for re-admission into the United States, it appears in the transcript of his examination that he said he entered the United States in 1906, whereas in his application for a Form 431 certificate prior to his departure for China, he stated that he had originally entered the United States in 1896 or 1897. In point of fact it is to be observed that the dates given are translations from the Chinese dates, which were the ones given by the applicant. When the applicant applied for a Form 431 certificate he stated that he originally entered the end of the 22nd year Kwong Suey, which translated would be the latter part of the year 1896 or the first part of the year 1897. When Chin Fong was questioned as an applicant for re-admission he stated, according to the transcript, that he had originally entered the United States in K. S. 32 year, which translated would be 1906. Thus the error was a mistake of ten years.

The commissioner states that when the attention of the applicant was directed to what he had stated prior to his departure for China, that he immediately corrected it, and stated that he had entered in K. S. 22 (1896-7). By referring to the examination of the applicant it will be seen that the state-

ment that he originally entered the United States in K. S. 32nd year must have been an unintentional error, because the applicant is called upon to account for his occupation during his years of residence in the United States. If the applicant originally entered the country in 1906-1907, and his prior examination was in 1911, he would have had an interval of four or five years to account for. In his examination he proceeds to state that he was a member of the Chinese drug store of Young Wah Tung for six years, three years of which they were on Mott Street and three years on Pell street, and he was thereafter employed as a salesman and prescription clerk in the drug store of Quong Hai Chung Co. for three years, and then, in addition to that, he was a member of Quong Mow Lung & Co. for another three years, thus accounting for steady occupation of twelve years during his residence in this country, which shows conclusively that the applicant simply made a slip of the tongue or was misunderstood when his expression was recorded as K. S. 32 instead of K. S. 22, which would have been ten years earlier. After the applicant had accounted for the steady occupation of over twelve years he was, upon a subsequent date, confronted with his former statement that he had originally entered the United States in K. S. 22. and his answer is as follows:

> Answer. "I said K. S. 22 I did not say K. S. 32 in my last statement." * * * "I thought you meant K. S. 22 instead of 32 when you asked me whether it was correct or not."

He describes his entry into the United States as follows:

> "A. I really came in K. S. 22, arriving in the United States across the border in the 5th month. I left China in the 4th month.
>
> Q. How did you cross the border? A. All the aliens were stopping at Montreal and there were two white men who called our names, and we went to Niagara Falls with them.
>
> Q. Didn't you cross the border surreptitiously and not through the regular Government channels? A. I was examined in a big building in Niagara Falls; after my examination I was taken to the train by the same man who examined me and put me on the train to New York.
>
> Q. You claim to have a section 6 paper and to have lost it. Is that correct? A. I do not know exactly what kind of a paper I had. I was young then— I do not know what kind of a paper, but I had a paper.
>
> Q. Describe it? A. Two page paper with my photograph attached to it and a lot of writing on it. There was also a gold seal on it. I got it at Canton City."

We feel that the Immigration Department officials view this testimony in too strict a manner, when we take into consideration the great many years that have elapsed since the events in question took place. This applicant entered the United States in 1896, a matter of some twenty-two years ago. It is not to be expected that his recollection of events in question would be as perfect as they were when the event transpired. A Chinese person coming to the United States from China at best has a pitiable inadequate conception of our modes and

methods of procedure relative to the laws and regulations with respect to Chinese persons. He goes through a certain procedure, all of which is new and strange to him, and then he finally knows that he is permitted to enter the United States, but many of the precise details or circumstances relating to his entry may be unknown to the applicant, or their importance not impressed upon his mind, so that after the lapse of many years, they have quite substantially faded from his mind. The Supreme Court of the United States has taken this view with respect to such examinations, and the attention of this Honorable Court is directed to the case of Tom Hong v. United States 193 U. S. 517, wherein it is held:

> "We do not find it necessary to determine this question in the cases now before us, for, in the opinion of the court, the testimony shows that the appellants were 'merchants' within the definition laid down by the law."
>
> * * * * * * *
>
> "It is true that after the lapse of so many years the appellants, when taken before the commissioner, were unable to produce the books or articles of copartnership of the firm. But some allowance must be made for the long delay, in their prosecution by the Government, and the natural loss of such testimony years after the firm's transactions were closed."

Tom Hong's case just cited, was decided by the Supreme Court March 21, 1904, a matter of ten years after the passage of the Registration Act, and it is therefore seen that the allowance mentioned by the Supreme Court had to do with the question

of the recollection of witnesses, after the passage of about seven or eight years, after allowance is made for the time consumed in getting the case before the Supreme Court, whereas in the present case, the testimony with respect to the applicant's admission into the United States relates back over an intervening period of sixteen or seventeen years, or substantially twice the period of time involved in the case of Tom Hong v. United States, supra.

In finally submitting this point to the consideration of this Honorable Court, we feel that the Government has not made out any showing at all that the prior residence of this applicant in the United States was illegal, or that he had entered the United States in a surreptitious manner, but on the contrary, that all of the evidence shows that the applicant entered this country in a lawful and a legal manner, and that his subsequent residence herein was perfectly legal. We feel the further fact should not be lost sight of, and that is, that this applicant lived in this country from his original entry in 1896 to his departure therefrom in 1912, a matter of sixteen years, and never during that period of time did the Government question his residence or bring any proceedings against him to have him deported from the United States. Upon this point we call the attention of the court to the case of United States v. Lee You Wing, 211 Fed. 939, decided by the Circuit Court of Appeals for the Second Circuit, wherein, on page 941 it is held:

> "The court below attached, and we think properly, some significance to the fact that, although he was refused a certificate on April 8, 1910, no steps were taken to have him deported until October 22, 1912, two years and six months afterwards. If he was unlawfully within the country in 1910, it was the duty of the officials of the Government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the Government made no move against him implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the Government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such an application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the Government and failed to secure the certificate."

Second. Upon the second point relied upon in this matter we have to say that since the discussion on this point, the decision of this Honorable Court in the case of Gin Dock Sue v. Backus, supra, has been announced, and it is felt that that decision would be controlling on this point adversely to the applicant. We do feel, however, that it is important as evidence corroborative of the showing made upon behalf of this applicant that he is and was a bona fide merchant within this country during all the time as claimed by him. The fact that during the 2½ years that he was at large upon bond was spent by him actively engaged in business as a mer-

chant in the same mercantile establishment of which he was a member, and which he submitted to the investigation of the Government authorities prior to his departure from the United States, and also after his return thereto, is certainly evidence of a most convincing character that his mercantile occupation is an honest and sincere one, and that it is entitled to recognition as such, by the Governmental authorities of the United States.

In finally concluding and submitting this matter for the consideration of this Honorable Court, we feel, upon the evidence presented in this matter and the points urged upon behalf of this applicant, that the appeal should be sustained with instructions to the lower court to issue the writ as prayed for, to the end that this applicant may be discharged from custody. The contention of the Government that this applicant is beyond the protection of the court upon the question of the legality or illegality of his prior residence in this country, in view of the authorities cited and the action of Congress as set forth is, to our minds, an untenable one, and there is no language more apt or more fitting in which to submit this matter to this Honorable Court than the language of the late ~~Chief~~ Justice Field in the case of Wong Wing v. U. S., 163 U. S. 228, wherein he held as follows:

> "The contention that persons within the territorial jurisdiction of this republic might be

beyond the protection of the law was heard with pain on the argument at the bar,—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws. Far nobler was the boast of the great French cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'

It is to be hoped that the poor Chinamen, now before us seeking relief from cruel oppression, will not find their appeal to our public institutions and laws a vain and idle proceeding."

With the foregoing this case is respectfully submitted for the consideration of this Honorable Court.

Dated, San Francisco,
October 16, 1918.

Respectfully submitted,

GEORGE A. MCGOWAN,
Attorney for Appellant.

No. 3180

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

CHIN FONG,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

APPELLEE'S REPLY BRIEF

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APPELLEE'S REPLY BRIEF.

POINTS AND AUTHORITY.

Appellant's claim is based upon the ground "that he is returning to a previously established mercantile domicile in the United States" (App. Opening Brief, pg. 1). This necessarily carries with it the claim that he has heretofore *lawfully* established a domicile in the United States to which he has a *lawful* right to return. That is the issue, and from the very statement of

the issue, it is clear that the scope of inquiry is not limited to the period of one year prior to his departure, as contended for by appellant's counsel. If the inquiry was thus limited, it follows that entry into the United States, however unlawful, even by a Chinese laborer, which is unquestionably unlawful, followed by his engaging in the mercantile business for one year or more, would give him the status of a merchant, and, being thus limited, he could never be deported for there is no authority anywhere for the deportation of a *lawfully* domiciled merchant, and it would also result in creating a statute of limitations, to-wit, deportation proceedings would have to be commenced within one year after such unlawful entry when the Chinese immediately engaged in a mercantile business, and in any event, prior to his having been engaged in said business for one year, while in fact, there is no limitation applying to an *unlawful* entry under the Chinese Exclusion and Restriction Acts. Again, the power to create a limitation is vested in the legislative and not the judicial branch of the Government. Pursuing the matter further, it is plain that if such a rule were adopted, limiting the evidence to one year prior to the departure of the Chinese before the executive branch of the Government, then if the procedure were had before the judicial branch of the Government under Section 13 of the Act of Sep-

tember 13, 1888, (as counsel contends) the rule would also apply, and the obvious result would be, that however unlawful the entry, one year or more of merchandising would be a complete protection against deportation however attempted, and the objects and purposes of the law would be frustrated and too by the commission, on the part of the Chinese, of an unlawful act.

In re-entry cases, the first inquiry naturally and logically is, when, where, how and under what provision of the Chinese Exclusion Laws did you previously enter the United States. These matters are clearly pertinent to the inquiry in re-entry cases. Reentry cases are specifically committed to the jurisdiction of the Immigration Department and it has frequently been held by the Courts, that one applying for entry or re-entry, and his right of entry or reentry is subjected to investigation and he is temporarily landed pending investigation, he is not, in contemplation of law, *within the United States,* even though he is physically therein. The Act itself provides "Such temporary removal shall not be considered a landing."

The same doctrine was enunciated by the United States Supreme Court in the case of the *U. S. vs. Ju Toy,* 198 U. S. 253-263, as follows:

> "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited, and the almost necessary result of the power of Congress to pass exclusion laws."

The proceeding for deportation through the judicial branch of the Government, referred to by counsel for appellant, in his opening brief, deals *solely* with Chinese *already within the United States.* To state it perhaps more clearly, where a Chinese has unlawfully *entered* the United States and is thereafter *found therein,* then the deportation proceedings fall within Section 13 of the Act of September 13, 1888. The distinction is plain, the jurisdiction equally so. That portion of Section 13 of said Act relied on by appellant's counsel reads: "That any Chinese person or person of Chinese descent, *found unlawfully in the United States,"* etc. In order to sustain counsel's contention there would have to be read into that section the words *"and all persons who apply for re-entry,"* etc., this the Government contends may not be done without doing violence to the

Act as well as to the well established rules of statutory construction.

Again, as bearing upon the question, and embodying the same principle, we cite the case of *Chu Chee,* 93 Fed. 797-804, where this Court speaking through Honorable W. W. Morrow, laid down the rule, to-wit,

> "A Chinese person, who obtains entry into the United States *without the certificate from the Chinese Government showing him to be a member of the class privileged to enter,* which is required by the Acts of Congress, cannot establish his right to remain, when arrested under the Act of May 5, 1892, as a Chinese laborer within the United States without the certificate of residence required by law, *by proof that since his entry he has not been a laborer, but has followed the occupation of a member of the privileged class.*
>
> But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to *their status at the time of arrest,* and *not at the time of entry,* and that, upon being arrested, it was competent for them to show by affirmative proof that they were students engaged in acquiring an education in our schools, and being so engaged, they were not members of the prohibited class, and not subject to deportation.
>
> When, however, that domicile has been acquired *contrary to and in violation of the laws of the United States,* and when, as here, it is only through an *unlawful entry into the United States* that the Chinese persons secure a residence in this country, *they cannot purge themselves of their offense* by assuming the occupation of mem-

> bers of the privileged class, and establish their right to remain by proof of that character. The right of the defendant to land in this country on the claim of being students was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by Section 6 of the Act of 1882, as amended; and to entitle them to remain here *they must thereafter produce the same to the proper authorities whenever lawfully demanded.*"

In the case of *Mar Bing Guey vs. United States,* 97 Fed. 576-580, the Court following the rule laid down in the *Chu Che* case, supra, says:

> "It is conceded by counsel that the appellant did not procure the certificate required by the Act of Congress prior to his departure from China, nor did he attempt to comply, in any respect, with the provisions of the Act. *Under the law the certificate was the sole evidence* permissible to establish his right of entry. His entry, therefore, was unlawful, *and his residence here is equally so;* and it is made the imperative duty of the justice, judge or commissioner, to cause a Chinese person to be deported "if found to be one not lawfully entitled to be or remain in the United States." The statutes above referred to effectually dispose of this case, and the ruling here announced finds abundant authority in its support. *Wan Shing v. U. S.,* 140 U. S. 424, 11 Sup. Ct. 729; *U. S. v. Chu Chee,* 35 C. C. A. 613, 93 Fed. 797; *In re Li Foon* (C. C.) 80 Fed. 881; *In re Wo Tai Li* (D. C.) 48 Fed. 668."

The Court in *Ex parte Mac Fock,* 207 Fed. 696-698, says:

"Estoppel cannot operate as against the Government, nor do the facts show abuse of discretion. Upon the conceded facts with relation to this certificate, it being all the proof that was presented, the Department of Immigration cannot be criticized for further examination with relation to the nativity of the petitioner. The examination as disclosed by the record seems to have been fair and impartial and no undue advantage taken of the petitioner. The examination disclosed that the petitioner was born in China; that he arrived in Vancouver and entered the United States at Richford, Vt.; that the certificate was there given to him; that it was fraudulently issued or obtained through perjury. The petitioner, if not an actual participant, was the beneficiary and knew of the wrongful practices.

Being in the United States unlawfully and the beneficiary of the certificate unlawfully issued, and having lived in the United States for seventeen years, and knowing of the fraud or perjury practiced upon the issuance of the certificate, and the fraudulent practices continued by him upon the Immigration Commissioner when he obtained an expression of regularity of such certificate, the petitioner upon the record before the Court cannot complain. No lapse of time would ripen such a wrong into a right *nor afford a basis upon which to predicate abuse of discretion.* The Department of Immigration did not abuse its discretion. *De Bruler v. Gallo,* 184 Fed. 566, 106, C. C. A. 546; *Chin Yow v. United States,* 208 U. S. 8, 28, Sup. Ct. 201, 52 L. Ed. 369; *Ex parte Lung Wing Wun* (D. C.) 161 Fed. 211; *United States v. Sing Tuck,* 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917.

> The motion is granted, the writ discharged, and the petitioner remanded to the custody of the Commissioner of Immigration.

The doctrine announced in the case of *Ekiu v. United States* found in the 142 U. S. 651; 35 L. Ed. 1149, is as follows:

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, *nor even been admitted into the country pursuant to law*, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Counsel for appellant in his opening brief, suggests five exceptions in this case, but finally groups them. As we view the situation, under the decisions, there can be but two questions subject to review by and consideration of the Court on Habeas Corpus.

1st. Has the applicant had a fair hearing?

2nd. Have the executive officers abused the discretion committed to them?

What constitutes a fair hearing is reasonably well established, but occasionally we find a new theory advanced and considered under the first of said ques-

tions and the already rather large field is made more comprehensive, but no claim is made by appellant that the hearing herein had was unfair, and thus the sole question here is the one of discretion.

Discretion could not arise in a case where the evidence is all in favor of the right of entry, or all against it. This condition seldom arises. If there is a substantial conflict in the evidence bearing upon the issue, then, as we believe, a discretion arises, and it is an abuse of this discretion that creates the second question that may be presented to the Court on Habeas Corpus.

We give a brief statement of the evidence and facts with the hope that it may aid the Court in its review, and cite the law we believe applicable thereto.

Chin Fong, on December 11, 1911, made formal application to the Chinese Inspector in Charge at New York, N. Y., for pre-investigation of his claimed status as a lawfully domiciled merchant and member of the firm of Kwong Mow Lan & Co., No. 8 Pell Street, New York City, stating his intention to depart and return through the Port of Seattle, Wash. The testimony of Chin Fong, Chin Yung, manager of said firm, John Delmonte, Robert Brand and Israel B. Brand was taken as required by rule 15 of the Chinese Rules and Regulations, by the Immigra-

tion officials at New York, and forwarded to the Commissioner of Immigration at Seattle, Wash., the port of departure, for his approval or disapproval as the facts should warrant. Said application for a merchant's return certificate was denied by the Commissioner of Immigration at Seattle, Wash., January 26, 1912, as follows: "I beg to state that from the evidence presented, I am not satisfied that this applicant is entitled to the endorsement he seeks. If he were admitted in 1897 as stated, it is quite likely that he has or did have an identification paper showing such admission. That paper should now be produced or its loss accounted for. If admitted as stated, the applicant should be able to give sufficient information about his admission to enable this service to verify the same. As the record now stands, it appears that Chin Fong is *not lawfully* within the United States, and it is for this reason that I have denied the application."

An appeal was taken from this decision to the Commissioner General of Immigration, who, on February 21, 1912, affirmed the same as follows: "After carefully considering the evidence presented in the record, I am of the opinion that Chin Fong has failed to establish his right to a merchant's return certificate. Your decision is therefore affirmed."

Notwithstanding the denial of a merchant's return

certificate, the said Chin Fong left the United States for China through the Port of San Francisco on the S. S. "Nile," November 23, 1912, at which time he presented to the Immigration Inspector, whose duty it was to check out Chinese departing on said vessel, affidavits of himself and two white witnesses as to his mercantile status, which said affidavits were endorsed by said Immigrant Inspector for identification purposes only. Chin Fong returned to the United States through the Port of San Francisco on the S. S. "Persia," December 23, 1913, presented said affidavit and applied for admission, claiming to be a lawfully domiciled Chinese merchant, returning from a temporary visit to China. His application to reenter the United States was denied by the Commissioner of Immigration at San Francisco, February 6, 1914, on the grounds that his former entry into the United States was unlawful. An appeal from this decision was taken to the Secretary of Labor, who approved the decision of the said Commissioner of Immigration that admission be denied. The finding of the Acting Secretary was as follows:

> "I am satisfied that the action recommended by the Bureau is the correct one in this case. The original entry of this man was obtained by fraud. He cannot predicate any right whatever upon the basis of fraud. The fact that he has been permitted to remain in this country constitutes no waiver of the right to deport him, and

> the fact that the Government has not heretofore affirmatively exercised the authority to deport him, while it amounts to tentative permission to remain here, does not preclude or estop the Government fro mexercising its authority to deport or deny admission at any time. A different question would be presented were the facts such that it did not appear that the alien's original entry was fraudulent. No business he might engage in nor length of residence here, can cure the fraud perpetrated by him in gaining admission in the first instance. This case appears to be quite fairly within the Mack Fock decision, which in my opinion, is correct. The recommendation that admission be denied is approved."

The matter was thereafter, to-wit, March 19, 1914, brought before the District Court on Habeas Corpus proceedings in case No. 15614. Judge Dooling in denying the Writ rendered the following opinion: (213 Fed. 288).

> "The petition shows that petitioner, Chin Fong, who had been a resident of the United States for a number of years, departed for China in November, 1912; that before he left he applied for a preinvestigation as to his status as a merchant, and a certificate was denied him, on the ground that his original entry into this country was surreptitious; that, notwithstanding this denial, the petitioner left the country, and is now endeavoring to re-enter as a returning Chinese merchant; that he presents the affidavits of a member of the New York firm to which he claims to belong and of two reputable Americans supporting his

claim; that, notwithstanding these facts, he has been denied admission and ordered deported on the same ground that his preinvestigation certificate was denied, that is to say, because his original entry was surreptitious; that in so deciding the immigration department has exceeded its authority, as that question can only be determined under the exclusion laws by a justice, judge or commissioner.

This, briefly stated, is the body of the present petition for a writ of habeas corpus. To this petition a demurrer has been interposed. I am of the opinion that the demurrer must be sustained.

Had the petitioner been content to remain in this country, he could have been deported only after a hearing before a justice, judge, or commissioner. But as he left the country voluntarily, and even after a preinvestigation certificate was denied him, the question of his right to re-entry lies peculiarly with the immigration department, and as they have found that he is not entitled to re-enter, such finding cannot be disturbed. A different rule prevails, and a different tribunal determines, in the case of a Chinese applying to enter from that of one already in this country, whom it is sought to deport, under the exclusion laws.

The demurrer will therefore be sustained, and the application for a writ denied."

An appeal from this decision was taken to the Supreme Court of the United States on the mistaken theory that the construction of a Treaty was involved. This appeal was thereafter dismissed for want of jurisdiction (241 U. S. 1). On May 25, 1917, a new

petition for writ of habeas, No. 16205, was filed and order to show cause issued. Respondent made return to the order to show cause and the matter was heard before Judge Dooling, June 7, 1917. In denying said petition for writ of Habeas Corpus, the Court said:

> "This matter came on regularly this day for hearing on the order to show cause as to the issuance of a writ of Habeas Corpus herein. C. A. Ornbaun, Esq., Assistant United States Attorney, was present for and on behalf of respondent, and filed a return to said petition.
>
> George A. McGowan, Esq., was present as Attorney for and on behalf of petitioner and detained. On his motion, the Court ordered that petitioner be, and he is hereby allowed to hereafter file a traverse to said return *nunc pro tunc* as of today, June 7, 1917. Said matter was thereupon argued by said attorneys and submitted. After due consideration had thereon, it is further ordered that said petition for a Writ of Habeas Corpus, be, and the same is hereby denied, and that the order to show cause be discharged accordingly."

It will be noted that counsel for petitioner and detained failed to traverse said return.

It is from this decision denying the Writ that this appeal is taken. Chin Fong, as an applicant for a merchant's return certificate, testified under oath before the Immigrant Inspector in New York City, January 3, 1912, as follows:

Q. What is your name?

A. Chin Fong.

Q. Have you any other name?

A. *No.*

Q. How old are you?

A. 33.

Q. Where were you born?

A. Ham Yee village, Sunning District, China.

Q. When did you first come to the United States?

A. *K. S. 22, 11th month* (December, *1896*-January, 1897.)

Q. How old were you at that time?

A. 18.

Q. Do you know the name of the place where you were admitted?

A. The port of entry is called Niagara Falls by the Chinese, it is near Niagara Falls. I don't know what you call it, but I was admitted at that Port.

Q. What kind of papers did you present?

A. Merchant's paper.

Q. That was the first time you had ever been in the United States?

A. Yes.

Q. Where did you get those papers?

A. Merchant of Young Wah Hong, 33 Mott Street, New York City.

Q. *Did they send the paper from New York to China?*

A. *Yes.*

Q. Did you come direct from the Port of entry to New York?

A. Yes.

Q. How long did it take you?

A. I took the train about noon at that place and reached New York in the evening.

Q. Have you been back to China since you first came to the United States?

A. No.

Testimony of Chin Fong at Angel Island, San Francisco, Cal., December 29, 1913:

Q. What are your names?

A. Chin Fong, *Chin Ai Chee,* no others.

Q. How old are you?

A. 34.

Q. Where were you born?

A. Hong Mee village, S. N. D.

Q. When did you first come to the United States?

A. *K. S. 32 (1906).* Sailed from China in the second month via S. S. "Empress of India." I do not know the date of arrival at Vancouver. I went to New York by way of Montreal as a *Section 6 Canton merchant,* under the name of Chin Fong.

Q. Where did you enter the United States?

A. I was examined at Niagara Falls by Immigration officers.

Q. What was that date?

A. About the *fourth month* of that year. I don't remember the date.

Q. Where is your Section 6 Certificate?

A. I kept that paper in the Yung Wah Tong Co., in which firm I have an interest. They were moving in the fifth or sixth month of S. T. 1, (1909) and it was lost during the time when they were moving.

Q. From what to what address were they moving?

A. From 32 Mott Street to 33 Pell Street.

Q. Immediately after your arrival in the United States, K. S. 32-4 (1906), what did you do?

A. I joined the Yung Wah Tong Chinese Drug Store, 32 Mott St., about the fifth month of that year in the position of salesman and prescription clerk.

Q. How long did you remain in that firm?

A. A little over *three years.*

Q. Until when?

A. Until K. S. *36*-8 (*1910*).

Q. Was there such a thing as Kwong Suey 36?

A. I don't remember how many years there were in the Kwong Suey reign. I stayed in the firm of Yung Wah Tong about *six years.*

Q. At what address was that store?

A. Three years on the Mott St. number, then they moved to 33 Pell St. for a little over three years and the firm went out of business.

Q. After the firm went out of business, what did you do?

A. Then I was employed at Quong Hai Chung Co., 32 Pell St. as a salesman and prescription clerk for about three years.

Q. Do we understand you to say that you arrived in the United States, K. S. 32-5 (1906), and were a member of the Yung Wah Tong for *six years* and employed in the Quong Hai Chung for *three years* before you departed for China?

A. No. I was a member of that cigar factory for another *three years.*

Q. What cigar factory?

A. Quong Mow Long Co., No. 8 Pell St.

Q. When did you join that firm?

A. K. S. *35 (1909).*

Q. Did you enter that firm in K. S. 35?

A. Yes.

Q. As an active member?

A. No. I merely purchased an interest.

Q. When did you become an active member in that firm?

A. I was an active member of that firm during the three years prior to my departure for China.

Q. From what date?

A. S. T. 2 (1910).

Q. How many years of Quong Suey were there before the reign of Sin Tung?

A. *I don't know.*

Q. How many years after K. S. 36 was S. T. 2?

A. *I don't remember.*

Q. Do we understand you to say that you were *six years* with the Yung Wah Tong, *three years* with the Quong Hai Chung and an active member of Quong Mow Long Co. for *three years* prior to your departure for China. Is that correct?

A. Yes.

Q. That is an impossibility. *Seven years* only have passed and you have accounted for twelve.

A. *I might have made a mistake about the time I worked for Quong Hai Chung. I don't know how many years I really worked there.*

Q. Should you not remember how long you worked in Quong Hai Chung?

A. I don't remember.

Q. What, don't you remember if you worked there every day?

A. One or two years.

Q. *Have you any other explanation to offer?*

A. *No.*

At the time this last quoted testimony was given, the Immigration officers at San Francisco had no knowledge that Chin Fong had heretofore made application for a merchant's return certificate in 1912, which had been denied. The record was forwarded to the New York office for further investigation of his claimed mercantile status, and it was only after that

office made its report that the San Francisco office knew of the testimony given by Chin Fong in New York on January 3, 1912. It was then that the conflicting testimony concerning his original entry into the United States was first discovered.

TESTIMONY OF JANUARY 3, 1912.

Q. When did you first come to the United States?

A. K. S. *22, 11th month* (December, 1896-January, 1887).

Q. How old were you at that time?

A. 18.

Q. Do you know the name of the place where you were admitted?

A. The port of entry is called Niagara Falls by the Chinese. It is near Niagara Falls. I don't know what you call it but I was admitted at that port.

Q. What kind of papers did you present?

A. Merchant's paper.

Q. That was the first time you had ever been in the United States?

A. Yes.

TESTIMONY OF DECEMBER 29, 1913.

Q. When did you first come to the United States?

A. K. S. 32 (1906). Sailed from China in the second month via S. S. "Empress of India". I do not know the date of arrival at Vancouver. I went to New York by way of Montreal *as a Section 6 Canton merchant*, under the name of Chin Fong.

Q. Where did you enter the United States?

A. I was examined at Niagara Falls by Immigration Officers.

Q. What was that date?

A. About the *fourth* month of that year—I don't remember the date.

Q. Where is your Section 6 certificate?

Q. Where did you get those papers?

A. Merchant of Young Wah Hong, 33 Mott St., New York City.

Q. *Did they send the paper from New York to China?*

A. *Yes.*

A. I kept that paper in the Young Wah Tong Co. in which firm I have an interest. They were moving in the fifth or sixth month of S. T. 1 (1909) and it was lost during the time when they were moving.

Q. From what to what address were they moving?

A. From 32 Mott St. to 33 Pell St.

Q. Immediately after your arrival in the U. S. in *K. S. 32-4 (1906)*, what did you do?

A. I joined the Yung Wah Tong Chinese drug store, 32 Mott St., about the fifth month of that year in the position of salesman and prescription clerk.

Q. Do we understand you to say that you arrived in the U. S. *K. S. 32-5 (1906)*, and were a member of the Yung Wah Tong for *six* years and employed in the Quong Hai Chung for *three* years before you departed for China?

A. No. I was a member of that cigar factory for another *three* years.

Q. Do we understand you to say that you were *six* years with the Yung Wah Tong, *three* years with the Quong Hai Chung, and an active member of Quong Mow Long Co. for *three* years prior to your departure for China. Is that correct?

A. Yes.

Q. That is an impossibility. Seven years only have passed and you have accounted for *twelve*.

A. I might have made a mistake about the time I worked for Quong Hai Chung. I do not know how many years I really worked for them.

Q. *Have you any other explanation to offer?*

A. No.

Here we find serious discrepancies in testimony given by Chin Fong about 22 months apart. On January 3, 1912, he testified that he first came to the United

States in *K. S. 22, the 11th month,* on paper sent to him in China *from New York.* On December 29th, 1913, he testified that he arrived in Vancouver, B. C., *K. S. 32 (1906)*, and entered the United States on the *fourth month* of that year on a Section 6 Certificate which he claims to have lost in 1909 when the firm with which he was connected was moving. The Inspector in charge at New York reports that no such move took place. Chin Fong names three firms with which he was connected from his arrival in K. S. 32 (1906) to 1912, the date of his departure. The time he claims to have been connected with these firms amounts to twelve years, while less than seven years have intervened between those date, and he fails to make any satisfactory explanation of the discrepancy

Chin Fong was again examined at San Francisco, January 24, 1914, at which time the Immigration officials had before them his testimony given in New York, January 3, 1912. His testimony is in part as follows:

Q. Are you the person who testified in this office December 29, 1913.
A. Yes.

Q. Do you wish to make any alterations or corrections in that statement?
A. *No.*

Q. You are absolutely positive that you do not care to make any alterations?
A. *Yes. I am sure.*

Q. How many trips have you made to China?
A. Only this trip.

Q. Have you at any time ever appeared before the Immigration Officers and testified?
A. Yes. I have testified in the New York office.

Q. When?
A. C. R. 1-10 (Nov. or Dec., 1912).
Q. In what case?
A. In my own case.
Q. What case was that? What was your own case at that time?

A. Applied for Form 431 (Merchant's return certificate).

Q. Did you get it?
A. No. *I received a letter stating I was acknowledged as a merchant by the office but to defer my trip until a further date.*

Q. Are you sure you are telling us the truth?
A. Yes.

Q. Do you wish to make any possible excuse or equivocation at all?
A. I do not.

Q. (Showing photo on Form 431, Dec. ....., 1911, N. Y. No. 2495-444, Seattle No. 28913.) Whose photograph is that?
A. That is myself.

Q. The record shows that under date of February 26, 1912, File No. 28913, that the Certificate you sought could not be granted. Why do you testify as you do?
A. I was told by the Chinese who represented me in my case that the office had acknowledged my mercantile status and that I could make the trip and so I made it.

Q. But your understanding seems to be an impossibility for the reason that the letter above mentioned is addressed to Chin Fong, care Kwong Mow Lan Co., 8 Pell St., New York City.

That shows that the letter written to you by the Commissioner at Seattle was addressed to you personally, and that in accordance with the Postal Laws and Regulations, that communication could only have been delivered to yourself.

A. I never received such communication while I was in New York.

Q. Do you expect this office, if you are a resident of New York City as you claim in your testimony of December 29th in this office, do you expect us to accept such a statement as that, that you did not receive a communication addressed to you in a Government envelope?

A. The interpreter I have employed representing me might have kept the communication himself and not have let me have it. I don't know how to read or write myself in English.

Q. You were represented by an attorney, Mr. Storey?

A. Yes. He told the interpreter that was representing me that the decision in Washington said that I could go to China and that I was acknowledged as a merchant.

To show that this testimony is a fabrication and untrue, we quote the correspondence passing between Chin Fong, his attorney Mr. Storey, and the Commissioner of Immigration at Seattle, Wash., when his application for a merchant's return certificate was denied.

New York, N. Y., January 25, 1912.

Mr. H. R. Sisson,
Chinese Inspector in Charge,
New York, N. Y.

Sir:

Referring to your letter of January 23, File 2495-444, in the case of Chin Fong, I beg to advise that the appeal filed by me in this case is herewith withdrawn.

Respectfully,
(Signed) James V. Storey.

Seattle, Washington,
January 31, 1912.

No. 28,913.

Inspector in Charge,
U. S. Immigration Service,
17 State St., New York, N. Y.

Sir:

Receipt is acknowledged of your letter of January 26, 1912, No. 2495/444, with which you inclosed letter from James V. Storey withdrawing his appeal from my decision in the Chin Fong departing merchant case.

Respectfully,
(Signed) Ellis De Bruler,
Commissioner.

New York City,
January 27, 1912.

To the Chinese Inspector in Charge,
Port of Seattle, Wash.

Dear Sir:

You will please take notice that I hereby appeal to the Department of Commerce and Labor, Washington, D. C., from your decision denying me the right to re-enter the U. S. as a resident, Merchant at No. 9 Pell Street, N. Y. and I de-

sire that a copy of the record in my case be forwarded to Washington at once.

Yours truly,

(Signed) Chin Fong,
Apperciate.

Seattle, Washington,
February 2, 1912.

No. 28,913.

Chin Fong,
c/o Kwong Mow Lan Company,
No. 8 Pell St., New York, N. Y.

Sir:

I am in receipt of your letter of January 27, 1912, giving notice of appeal from my decision denying you an indorsement as a domiciled merchant. It is suggested that you call on your attorney, Mr. James V. Storey, or on Inspector in Charge Sisson relative to this matter. As Mr. Storey, after reviewing the record in your case, has formally withdrawn the appeal he had filed. Of course, if you desire to reinstate your appeal you have the privilege of doing so. The matter will be held in abeyance pending the receipt of further advice from you.

Respectfully,

(Signed) Ellis De Bruler,
Commissioner.

New York City, N. Y.
February 7, 1912.

U. S. Commissioner of Immigration,
Seattle, Washington.

Dear Sir:

Mr. Storey withdrew from my case at my request, but I desire to have my case reviewed by the Department at Washington. Therefore will

you kindly forward the papers to Washington and notify me.

Yours truly,

(Signed) Chin Fong,
Apperciate.

Seattle, Washington,
February 14, 1912.

No. 28,913.
Chin Fong,
c/o Kwong Mow Lan Company,
No. 8 Pell Street,
New York, N. Y.

Sir:

Your letter of February 7th was received today. It is noted that though your attorney, Mr. Storey, has withdrawn appeal in your case, you desire to have the matter reviewed by the Bureau. In accordance with your request the record will tomorrow be forwarded to the Commissioner-General of Immigration. On receipt of decision you will be notified.

Respectfully,

(Signed) Ellis De Bruler,
Commissioner.

Seattle, Washington,
February 26, 1912.

No. 28,913.
Chin Fong,
Care Kwong Mow Lan Co.,
8 Pell Street,
New York City.

Sir:

Referring to my letter to you of February 14th last, I beg to inform you that I am this day in receipt of a letter from the Bureau, affirming my decision in the matter of your application for pre-investigation of your status as a merchant.

In view of that decision the certificate you seek cannot be granted to you.

Respectfully,

(Signed) Ellis De Bruler,
Commissioner.

Q. Your statements are inconsistent and not in accord with the record. We will therefore rely upon the record rather than upon your statements. You also testified that you were examined in Niagara Falls about the *4th* month of *K. S. 32* (1906). *Is that correct?*

A. *Yes.*

Q. *Do you wish to make any alterations or corrections in any particular?*

A. *No.*

Q. On January 3, 1912, in New York, you testified that you first entered the U. S., K. S. 22-11, at the two statements in the two applications.

A. I said K. S. 22. I did not say K. S. 32 in my last testimony.

Q. Just a moment ago you said that the statement of K. S. 32 was correct. You verified your original testimony *before being confronted with the New York record.*

A. I thought you meant K. S. 22 instead of K. S. 32, when you asked me whether it was correct or not.

Q. Why is it you give a *different month* in the two different records?

A. I really came K. S. 22, arriving in the United States across the border in the *fifth month.* I left China in the fourth month.

Q. How did you cross the border?

A. All the aliens were stopping in Montreal and there were two white men who called our names and we went to Niagara Falls with them.

Q. Didn't you cross the border surreptitiously and not through the regular Government channels?

A. I was examined in a big building in Niagara Falls and after my examination I was taken to the train by the same man who examined me and put on the train to New York.

Q. You claim to have had a Section 6 paper and to have lost it. Is that correct?

A. I do not know exactly what kind of a paper I had. I was young then. I do not know what kind of a paper, but I had a paper.

Q. Where is that paper now?

A. At the time our store moved we lost it.

Q. What store?

A. Yung Wah Tung Co.

Q. When did you lose it? What date?

A. K. S. 34-7 or 8.

Q. Why is it that you do not give the same testimony today as you did on December 29th as to the date? Can't you give the same testimony within a month?

A. *No answer.*

Q. As a matter of fact, according to the report at New York City, no such move ever took place. How do you account for that?

A. It was formerly on Mott Street and then moved to Pell Street. There was such a move.

Q. What number Pell Street?

A. The store is not in existence now.

Q. What was the number at that time?

A. 33.

Q. You are also advised that the firm who now occupies 33 Pell Street has been there for many years last past, which also shows that your statement is incorrect. Why do you make such statements?

A. The store was sold to this Sam Yup man, named Ah Fong. The name of the firm was Fong Kee.

Q. Is Fong Kee at 33 Pell Street now?

A. Yes.

Q. You are advised that this is not a correct statement according to the investigation at New York. Why not tell the truth?

A. There is a Fong Kee.

Q. Do you expect us to believe you in preference to the investigation conducted at New York City by members of the Immigration Service?

A. I did not have to come in illegally at that time. *Yung Wah Tong got my papers for me* in China and the rules of the Exclusion Act at that time were not so severe as it is now, *and it was easy for me to get in at that time.* I did not have to come into this country *at that time illegally.*

Here again we find contradictions as to the date of entry, the kind of papers on which he was admitted, how and where they were procured and when and how they were lost. On January 3, 1912, he testified that he first entered in *K. S. 22, 11th month,* (*December, 1896-January, 1897*). On December 29, 1913,

he fixes the date as *K. S. 32, fifth month* (*June or July, 1906,*) and on January 24, 1914, when confronted with his testimony of January 3, 1912, he gives an altogether different date, to wit, *K. S. 22, 5th month* (*June or July, 1896*).

On January 3, 1912, he testified that he was admitted on merchant's papers sent him in China from New York. On December 29, 1913, that he was admitted as a Section 6 Canton merchant, while on January 24, 1914, he testified: "I do not know exactly what kind of papers I had. I was young then. I do not know what kind of a paper but I had a paper. I did not have to come in illegally at that time. Yung Wah Tong got my papers for me in China."

On December 29, 1913, when asked to produce the papers on which he was first admitted, he testified that they were lost in the *fifth or sixth month of S. T.* 1 (*1909*), when the firm with which he was connected was moved from 32 Mott St. to 33 Pell St., while on January 24, 1914, he testified that they were lost *K. S. 34-7 or 8* (*Aug. or Sept., 1908*).

The Inspector in Charge at New York reports that Quan Yuen Shing Co. has occupied the premises at 32 Mott St. for many years last past, as is also the case with the firm of Chong Long & Co., at 33 Pell St. So the move described by Chin Fong, when his

papers are claimed to have been lost, could not have taken place. When advised that the firm who now occupies 33 Pell St. has been there for many years, he testified as follows: "The store was sold to this Sam Yup man, named Ah Fong. The name of the firm was Fong Kee. Q. Is Fong Kee at 33 Pell St. now? A. Yes. Q. You are advised that this is not a correct statement according to the investigation at New York. Why not tell the truth? A. There is a Fong Kee."

Obviously no such move as described by Chin Fong ever took place, and he could not have lost his papers in the manner described by him. The evidence plainly shows that Chin Fong must have known and did know the reason why the merchant's return certificate was denied him in 1912, and that the only thing necessary for him to do in order to get such a return certificate, was to produce documentary evidence of his lawful admission into the United States, or if such evidence was not in his possession, then to furnish the Immigration officers with such information regarding the time and place of his entry as would enable them to verify his claim from their records. No documentary evidence was offered at any of the examinations, nor has its absence been satisfactorily explained.

Chin Fong claims to have been admitted at Niagara Falls, New York, which place, however, was not a port or entry for Chinese at any of the time mentioned by him as the date of his admission, and his entry cannot be verified by the Government records.

Chin Fong knew the reason he was not granted a return certificate, knew that he had not shown to the Immigration authorities that he ever had a section 6 certificate as he claimed. He knew that he had not shown a lawful entry, and this knowledge he acquired a year or more prior to his departure. He was in China thereafter for a year or more and at the very place where he claims he secured his certificate, and thus was afforded an opportunity, and all the circumstances rendered it not only possible but required him to procure and upon his return produce the evidence of his having had issued to him by his Government in China, either in 1896 or 1897 or 1906, a Section 6 Certificate, but he returns without any evidence whatever respecting this vital point. The conclusion is too plain to require comment. If he had "a pitiable inadequate conception of our modes and methods of procedure relative to the laws and regulations with respect to Chinese persons" in 1896 or 1906, whenever it was he first came here, as counsel very feelingly pleads, his long residence here and his

effort to secure a return certificate which was denied, was certainly sufficient to remove that pitiable and inadequate conception, and bring rather clearly, if not forcibly, to his mind that the Chinese Exclusion and Restriction Acts were not enacted for an idle purpose nor to be ignored at will by those who found it possible or convenient to do so.

It is a quite well known fact, established by the record of Chinese who come to the United States, with or without right of entry, that they are not ignorant of either the rules and regulations nor of the law respecting their right of entry, and they are by no means in the condition or class counsel seeks to place them, and appellant affords no exception. This fact is clearly demonstrated by his own testimony in reference to the law at the time of his first entry as well as any changes therein since, to-wit: "I did not have to come illegally *at that time.* * * * *The rules of the Exclusion Act at that time* were not so severe *as it is now*, and it was easy for me to get in at that time. I did not have to come to this country at that time illegally." There is also nothing in the record that lends support to counsel's further statement in mitigation of the many conflicting statements in appellant's testimony in, that the *details* of his entry "have quite substantially faded from his mind". It is not lack of *detail* that we are

dealing with, but the vital things shown by the record that attracts the attention of the Government and which are so apparent they cannot be minimized by calling them details. Appellant's statements cannot be harmonized nor are they the result of a "faded memory," but they fall clearly within and are a perfect exemplification of the truism, "Oh, what a tangled web we weave when first we practice to deceive."

The record clearly discloses such substantial conflict in the evidence on material matter which of necessity called for the exercise of judgment and discretion on the part of the executive officers and this discretion has been exercised. Where power is vested in Appellate Courts to review an exercised discretion, there must appear a *clear* abuse of discretion before it will be disturbed. The above and kindred doctrine has heretofore been so frequently announced that citation of authority is hardly necessary, however, we cite a few cases.

In *Bates & Guild v. Payne,* 194 U. S. 106; 48 L. Ed. 894, the Court says:

> "Where Congress has committed to the head of a Department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the Courts, unless he has exceeded his authority or this Court

should be of opinion that his action was *clearly* wrong."

The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by Congress to the judgment and discretion to the head of a Department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it *a strong presumption* of its correctness, and the Courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing."

In 216 U. S. 251, 262; 54 Law Ed. 469-472, the Court says:

"The appeal made by the complainant to the Department was really nothing but an appeal to its discretion. Assuming that the Court in some cases has the power to, in effect, review the determination of the Department, we do not think this is an occasion for its exercise. The complainant is really appealing from the discretion of the Department to the discretion of the Court, and the complainant has no clear legal right to obtain the order sought."

In *Lou Wah Suey vs. Backus,* 225 U. S. 460 (56 L. Ed. 1167) which seems to be the latest case in point, the Court, speaking through Mr. Justice Day says:

"A series of decisions in this Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders

> made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, *or that there was a manifest abuse of the discretion committed to them by the statute.* In other cases the order of the executive officers within the authority of the statute is final. U. S. vs. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040, 225 Sup. Ct. Rep. 644; Chin Yow vs. U. S., 208 U. S.; 8, L. Ed. 369, 28 Sup. Ct. Rep. 201; Tang Tum vs. Edsell, 223 U. S. 673."

It is suggested on pages 32-33 of Counsel's Opening Brief, that appellant's mercantile status during the two and one-half years he was at large *on bond* should be considered as a factor herein. We have heretofore called the Court's attention to the Government's position that no mercantile status within the meaning of the Chinese Exclusion and Restriction Acts can be based upon an unlawful entry; that there is no entry in contemplation of law pending an investigation and until a final order is made by the Court, but in addition to this, the transcript of the the record shows that this two and one-half years referred to and while appellant was so at large on bond, was, at least in part occasioned by the acts and proceedings of appellant in his original petition for Habeas Corpus and his appeal to the Supreme Court of the United States. This latter appeal was dismissed

June 7, 1916, and an order entered requiring the surrender of appellant to the Immigration officers for deportation, and the transcript of the record on page 23 thereof, contains the following: "That although frequent requests were made on the part of the Government to have said detained surrendered, it was not until on or about *May 24, 1917*, that said detained was surrendered to the Government officials." It is at least a remarkable claim, on the part of counsel, to make to the Court that consideration be given as to what appellant was doing during the period of time he, not only delayed a final decision, *but failed to surrender himself to the Government officers for almost a year after the final decision and order of the Supreme Court.*

When the decision on his first writ of Habeas Corpus had become final and he was finally surrendered to the Government officials for deportation, he again applied for a writ of Habeas Corpus, to-wit, the proceeding now before this Court, and this Court is now confronted with the suggestion that this two and one-half years of litigation during which time it is said by counsel that appellant was a merchant, "is certainly evidence of a most convincing character that his mercantile occupation is an honest and sincere one and entitled to recognition by the Governmental authorities of the United States."

The cases cited by petitioner's counsel, page 25 of Opening Brief, "illustrative of the point that a legal domicile and exempt status will be recognized in the absence of evidence showing a legal entry" are not in point at all, but are to be differentiated from the case at bar in this: That in the cases cited wherein Chinese are involved, the Chinese were all residents of the United States before the Registration Acts of May 5, 1892, and Nov. 3, 1893, were passed and had either registered under said Acts or were merchants during the period of registration and therefore not required to register, as Chinese laborers only were required to register at that time. Chin Fong did not enter the United States until several years after the registration period, according to his own testimony not until 1897 or 1906, and therefore could have no certificate of residence. The other cases cited arose under the general Immigration Laws and are not at all applicable to the case now under consideration.

We have no fault to find with counsel's quoting the Wong Wing case. The language of the Cardinal quoted by the late and distinguished Judge Field expresses a sentiment that meets not only the approval but the admiration of all and no doubt was properly applied to the facts in the case then before that Court, and to which they were directed, but in

what particular it is applicable to any phase of the case at bar is not pointed out by counsel, and without which it is not made clear.

Chin Fong has had a hearing in every department of the Immigration Service; he has had his case heard twice in the District Court; once in the United States Supreme Court and is now in the Circuit Court of the United States, and thus will have had his case heard in all the United States Courts thus far established or authorized by the Constitution of the United States, and the Supreme Court of the United States has determined that there is no constiutional question involved, nor has applicant been denied any constitutional right. His effort is directed solely to securing from the Courts a decision that a Chinese who has been engaged in a mercantile business in the United States for one year or more has acquired a lawful mercantile status, irrespective of an unlawful entry and to limit the investigation to the time he was thus engaged.

Respectfully submitted,

ANNETTE ABBOTT ADAMS,
United States Attorney,

BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Appellee.